No. 16-534	
Title:	**Jenny Rubin, et al., Petitioners** **v.** **Islamic Republic of Iran, et al.**
Docketed:	October 19, 2016
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(14-1935)
Decision Date:	July 19, 2016
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Oct 17 2016	Petition for a writ of certiorari filed. (Response due November 18, 2016)
Nov 16 2016	Order extending time to file response to petition to and including November 25, 2016, for all respondents.
Nov 22 2016	Brief of respondent Field Museum of Natural History in opposition filed.
Nov 23 2016	Brief of respondent Islamic Republic of Iran filed.
Nov 23 2016	Brief of respondent The University of Chicago in opposition filed.
Dec 06 2016	Reply of petitioners Jenny Rubin, et al. filed. (Distributed)
Dec 07 2016	DISTRIBUTED for Conference of January 6, 2017.
Dec 09 2016	Letter of December 6, 2016, from counsel for petitioners received. (Distributed)
Jan 09 2017	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Kagan took no part in the consideration or decision of this petition.
May 23 2017	Brief amicus curiae of United States filed.
Jun 06 2017	Supplemental brief of petitioners Jenny Rubin, et al. filed. (Distributed)

Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 27 2017	Petition GRANTED limited to Question 1 presented by the petition. Justice Kagan took no part in the consideration or decision of this petition.
Jul 31 2017	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 1, 2017.
Jul 31 2017	The time to file respondents' briefs on the merits is extended to and including October 23, 2017.
Aug 23 2017	Motion to dispense with printing the joint appendix filed by petitioner Jenny Rubin, et al.
Sep 01 2017	Blanket Consent filed by Respondent Islamic Republic of Iran.
Sep 01 2017	Blanket Consent filed by Petitioners, Jenny Rubin, et al.
Sep 01 2017	Blanket Consent filed by Respondent, Field Museum of Natural History on 09/13/2017
Sep 01 2017	Brief of petitioner Jenny Rubin, et al. filed.
Sep 05 2017	Blanket Consent filed by Respondent, University of Chicago on 09/12/2017
Sep 08 2017	Brief amici curiae of Foundation for Defense of Democracies filed.
Sep 08 2017	Brief amici curiae of Victims of Iranian Terrorism filed.
Sep 08 2017	Brief amici curiae of Former U.S. Counterterrorism Officials, et al. filed.
Sep 13 2017	Blanket Consent filed by Petitioner, Jenny Rubin, et al. on 09/13/2017
Sep 25 2017	Motion to dispense with printing the joint appendix filed by petitioners GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 06 2017	SET FOR ARGUMENT ON Monday, December 4, 2017.

Oct 10 2017	Letter of respondent Field Museum of Natural History advising the Court that it has no interest in the outcome of proceedings in this Court and waiving the filing of a brief on the merits.
Oct 20 2017	CIRCULATED
Oct 23 2017	Brief of respondent Islamic Republic of Iran filed. (Distributed)
Oct 23 2017	Brief of respondent University of Chicago filed. (Distributed)
Oct 30 2017	Brief amicus curiae of United States filed. (Distributed)
Oct 30 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 21 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Nov 22 2017	Reply of petitioners Jenny Rubin, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2017	Argued. For petitioners: Asher Perlin, Hollywood, Fla. For respondents: David A. Strauss, Chicago, Ill; and Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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RECORD AND BRIEFS

16-534
No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the original execution immunity provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* (the "FSIA"), plaintiffs holding terrorism judgments against designated state sponsors of terrorism "faced practical and legal difficulties at the enforcement stage." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317-18 (2016). "[O]nly foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318. In 2008, Congress enacted 28 U.S.C. § 1610(g) to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. *Id.* at 1318 n.2.

The Seventh Circuit held below that section 1610(g) merely amends the existing attachment immunity provisions to enable terrorism judgment creditors to enforce their judgments against the foreign governments' instrumentalities that have been established as separate juridical entities. This holding conflicts with the Ninth Circuit's decision in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016), which held that section 1610(g) provides a freestanding attachment immunity exception, which ***in addition to*** enabling veil piercing, allows terrorism victims

QUESTIONS PRESENTED – Continued

to attach and execute upon ***any*** assets of foreign state sponsors of terrorism, their agencies, or instrumentalities regardless of whether the assets are connected to commercial activity in the United States.[1]

The first question presented for review is:

Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610.

2. Section 1610(a) is another execution immunity provision of the FSIA. It enables execution upon "property in the United States of a foreign state . . . ***used for a commercial activity*** in the United States" under certain specified conditions enumerated in the statute. The statutory text refers to the commercial use without respect to any particular actor.

The second question presented for review is:

Whether the commercial use exception to execution immunity, codified at 28 U.S.C. § 1610(a), applies to a foreign sovereign's property located in the United States only when the property is used by the foreign state itself.

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[1] Iran has filed a petition for a writ of certiorari challenging the Ninth Circuit's *Bennett* decision based upon the conflict with the Seventh Circuit's decision below as to the construction of section 1610(g). See Supreme Court Case No. 16-334.

LIST OF PARTIES

The Petitioners were judgment creditors in the Northern District of Illinois seeking to enforce a judgment previously entered in the District Court for the District of Columbia. They were the appellants in the court of appeals.

Respondent, Islamic Republic of Iran, was the judgment debtor in the district court and the appellee in the court of appeals.

Respondents, Field Museum of Natural History and University of Chicago, Oriental Institute, were respondents to the judgment creditors' citations to discover assets in the district court, and appellees in the court of appeals.

The United States is not a party to this action. However it appeared in the district court to file statements of interest pursuant to 28 U.S.C. § 517, and in the court of appeals to file an *amicus* brief and present oral argument supporting the position of the appellees.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. Introduction	1
II. The Statutory Framework	4
A. The Foreign Sovereign Immunities Act	4
B. Section 1610(a) – The Commercial Use Exception To Execution Immunity	8
C. Section 1610(g) Was Enacted To Expand The Range Of Assets Available To Satisfy Terrorism Judgments	9
III. Jurisdiction Of The Lower Courts	13
IV. Proceedings Below	14
A. The Judgment	14
B. The Enforcement Proceedings In The District Court For The Northern District Of Illinois	14
C. The Seventh Circuit Affirms The Judgment Against The Petitioners	14

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE PETITION ... 21

I. The Seventh Circuit's Decision Construing Section 1610(g) Warrants Review 21

A. The Seventh Circuit Has Entered A Decision That Creates An Express And Broad Circuit Conflict On The Construction Of Section 1610(g) 21

B. Establishing The Correct Meaning Of § 1610(g) Is Important..... 23

C. The Seventh Circuit's Construction Of Section 1610(g) Is Wrong..... 24

D. This Case Presents The Ideal Vehicle For Resolving The Circuit Split..... 28

II. Declaring A Consensus As To The Meaning Of Section 1610(a), The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court 30

A. The Seventh Circuit Interpretation Of Section 1610(a) Requires Review. 32

B. This Case Presents The Ideal Vehicle For Determining Whether Only Use By The Foreign State Subjects Property To Execution Under § 1610(a) 36

CONCLUSION..... 38

TABLE OF CONTENTS – Continued

Page

APPENDIX

Seventh Circuit Court of Appeals, Opinion, July 19, 2016 ..... App. 1

Northern District of Illinois Eastern Division District Court, Memorandum Opinion and Order, March 27, 2014 ..... App. 43

Foreign Sovereign Immunities Act ..... App. 72

TABLE OF AUTHORITIES

Page

CASES

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007) 18, 37

Aurelius Capital Partners, L.P. v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009) 18, 37

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) ..... *passim*

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) 32

Bennett v. Islamic Republic of Iran, 799 F.3d 1281 (9th Cir. 2015) 2, 9

Bennett v. Islamic Republic of Iran, 825 F.3d 950 (9th Cir. 2016) ..... *passim*

Bennett v. Islamic republic or Iran, 817 F.3d 1131 (9th Cir. 2016) 2

Campuzano/Rubin, 281 F. Supp. 2d 258 (D.D.C. 2003) 14

Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011) 34

Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002) 18, 36

Dean v. United States, 556 U.S. 568 (2009) 33, 34

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) 6

TABLE OF AUTHORITIES – Continued

Page

Estate of Heisler v. Islamic Republic of Iran, 807 F. Supp. 2d 9 (D.D.C. 2011) 10, 11, 24

First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) ..... *passim*

Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014) 19

In re Islamic Republic of Iran Terrorism Litig, 659 F. Supp. 2d 31 (D.D.C. 2009) 9, 10, 11, 24

Kirschenbaum v. 650 Fifth Avenue, 830 F.3d 107 (2d Cir. 2016) 22

Park 'n Fly v. Dollar Park & Fly, 469 U.S. 189 (1984) 32

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 6, 15, 33

Republic of Argentina v. NML Capital, Ltd., 573 U.S. ___, 134 S. Ct. 2250 (2014) 5, 7, 8, 33

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) .....

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 7

Samantar v. Yousef, 560 U.S. 305 (2010) 7, 35

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 4, 5

Weinstein v. Islamic Republic of Iran, ___ F.3d ___, 2016 WL 4087940 (D.C. Cir. 2016) 22, 24

Wyatt v. Syrian Arab Republic, 83 F. Supp. 3d 192 (D.D.C. 2015) 30

TABLE OF AUTHORITIES – Continued

Page

Wyatt v. Syrian Arab Republic, 800 F.3d 331 (7th Cir. 2015) 19

Wyatt v. Syrian Arab Republic, 2015 U.S. Dist. LEXIS 46525 (D.D.C. 2015) 13

STATUTES

18 U.S.C. § 924 33

28 U.S.C. § 517 17

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 14

28 U.S.C. § 1330 14

28 U.S.C. § 1331 14

Foreign Sovereign Immunities Act of 1976

28 U.S.C. §§ 1602 et seq. 1, 2, 5

28 U.S.C. § 1604 6

28 U.S.C. § 1605A 8, 26, 27

28 U.S.C. § 1605(a)(2) 15

28 U.S.C. § 1605(a)(3) 7, 34

28 U.S.C. § 1609 6

28 U.S.C. §§ 1609-1611 5

28 U.S.C. § 1610 ..... *passim*

28 U.S.C. § 1610(a) ..... *passim*

28 U.S.C. § 1610(a)(1)-(6) 8

28 U.S.C. § 1610(a)(1)-(7) 8, 31

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1610(a)(7) 8, 27

28 U.S.C. § 1610(b)(3) 27

28 U.S.C. § 1610(g) ..... *passim*

28 U.S.C. § 1610(g)(1) 12, 25

28 U.S.C. § 1963 14

Terrorism Risk Insurance Act of 2002 ..... 11, 24

RULES

Seventh Circuit Rule 40(e) 3, 19, 20

OTHER AUTHORITIES

154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg) 23

H.R. Rep. No. 11-447 (2007) 23

OPINIONS BELOW

The opinion of the court of appeals for the Seventh Circuit, App. 1-38, and the opinion of Judge Hamilton dissenting from the denial of *en banc* review, App. 39-42, are reported at *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016). The decision of the District Court for the Northern District of Illinois, App. 43-71, is reported at *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014).

JURISDICTION

The court of appeals issued its order and judgment on July 19, 2016. App. 1-38. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* are set forth in the Appendix. App. 72-98.

STATEMENT OF THE CASE

I. Introduction.

This petition presents important questions of federal law pertaining to two separate executional immunity provisions of the Foreign Sovereign Immunities Act,

28 U.S.C. §§ 1602, *et seq.* (the "FSIA"). Both questions present pure questions of law. And, both pertain to the range of assets of a foreign state that are subject to attachment and execution by judgment creditors of the foreign state.

1. 28 U.S.C. § 1610(g) is a remedial provision designed to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016). In *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016), the Ninth Circuit held that subsection (g) is a freestanding provision for attaching and executing against ***any*** assets of a foreign state or its agencies or instrumentalities, and is not dependent upon any other execution immunity provisions in section 1610.[2] In this case, the Seventh Circuit explicitly disagreed with the Ninth Circuit, holding that section 1610(g) "is not a freestanding terrorism exception to execution immunity." App. 7. The court held section 1610(g) does no more than enable judgment creditors of a designated state sponsor of

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[2] The Ninth Circuit issued three successive decisions in *Bennett*, each interpreting section 1610(g) as an independent execution immunity exception. The first opinion, written by Judge Kozinski, is reported at *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015) ("*Bennett I*"). Upon Iran's first motion for rehearing, the decision was withdrawn and superseded by second decision authored by Judge Graber. 817 F.3d 1131, (9th Cir. 2016) ("*Bennett II*"). Iran filed a second motion for rehearing. And, the Ninth Circuit entered its third and final decision in which it reaffirmed its prior construction of section 1610(g). 825 F.3d 950 (9th Cir. 2016) ("*Bennett III*").

terrorism to enforce their judgment against the state's agencies or instrumentalities without regard to whether the agency or instrumentality is juridically separate from the state. App. 34. The court further limited the applicability of subsection (g) by holding that it applies only where the judgment holders can satisfy one of section 1610's execution immunity exceptions that apply to foreign states. App. 35. Thus, the Seventh Circuit's decision in this case creates a broad and explicit conflict with the Ninth Circuit's decision in *Bennett*. App. 26. As Judge Hamilton wrote in his dissent from the denial of *en banc* review,[3] this conflict "has important practical consequences." App. 39. The Seventh Circuit's holding "shelters from execution a wide range of assets of state sponsors of terrorism" that the Ninth Circuit's decision renders subject to attachment and execution. App. 39-40. The Court should grant this petition to resolve the circuit conflict.

2. The Seventh Circuit also held that the commercial use exception to execution immunity codified at 28 U.S.C. § 1610(a) "applies only when the ***foreign state itself*** has used its property for a commercial activity in the United States." App. 20. (emphasis in original). This holding deviates from the statutory text,

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[3] Under Seventh Circuit Rule 40(e), because a majority of active judges on the Seventh Circuit were disqualified from participating in the consideration of this case, rehearing *en banc* was impossible. App. 35 n.6; App. 39. Judge Hamilton filed a dissenting opinion arguing that with *en banc* review procedurally precluded, the court erred in overruling circuit precedent and creating a circuit split. App. 39. Judge Hamilton also disagreed on the merits of the court's decision as to section 1610(g).

which indicates that any commercial use of the foreign sovereign's property suffices to defeat immunity. The Seventh Circuit ignored numerous decisions of this Court requiring courts to adhere to statutory text except where compelled by ambiguity or inconsistency to look for interpretive guidance elsewhere.

Even more troubling, the court ***misconstrued*** decisions of three other courts of appeal to artificially and unilaterally declare "an emerging consensus" aligned with the Seventh Circuit's own narrow, non-textual construction of subsection 1610(a). App. 16, 20. In fact, not one of the decisions cited among the purported "consensus" raised or addressed the question of "whose commercial use counts." If left un-reviewed by this Court, the Seventh Circuit's mistaken declaration of consensus on this important question will likely preempt any further consideration of this question. Under these circumstances, the important question of "whose commercial use counts" under the commercial use exception to foreign sovereign execution immunity should be settled by this Court.

II. The Statutory Framework

A. The Foreign Sovereign Immunities Act

1. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA replaced the prior common law-based immunity regime under

which courts regularly deferred to executive branch recommendations regarding immunity. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2255 (2014). Under the former immunity regime, "sovereign immunity decisions were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 188. "Congress abated the bedlam in 1976," replacing the old system with the Foreign Sovereign Immunities Act's comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. *NML Capital, Ltd.*, 134 S. Ct. at 2255. The FSIA is codified at 28 U.S.C. § 1602, *et seq.*

2. The FSIA provides foreign states with two types of immunity. *NML Capital, Ltd.*, 134 S. Ct. at 2256. The first, jurisdictional immunity, shields foreign sovereigns from jurisdiction of United States courts. *Id.* The second form of immunity under the FSIA pertains to the enforcement of judgments, and protects foreign sovereigns from attachment and execution as provided in 28 U.S.C. §§ 1609-1611. This petition requests that the Court resolve important questions regarding the scope of two of the FSIA's executional immunity provisions.

3. The FSIA codified the "restrictive theory" of immunity, which, as its name suggests, restricted or limited the broad immunity previously extended to foreign sovereigns. *Verlinden*, 461 U.S. at 486. Under the restrictive theory, foreign states enjoy immunity when

they engage in activities "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Conversely, it does not immunize "a foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Id.* Nonetheless, even under the restrictive theory, as codified in the FSIA, foreign sovereigns are presumed to be immune from jurisdiction of United States courts, and from attachment, arrest and execution, unless a statutory exception provides otherwise. *See* 28 U.S.C. §§ 1604, 1609.

Applying the restrictive theory of immunity, the Court has repeatedly insisted that lower courts refrain from expanding foreign sovereign immunity beyond that conferred by statute. Thus, in *Weltover*, the Court held that the government of Argentina was subject to jurisdiction in New York when Argentina defaulted on certain government bonds that were payable in New York. 504 U.S. at 609-10. The Court relied on the text of the FSIA when it refused to expand the scope of jurisdictional immunity relating to a foreign state's commercial activity. The Court found that the argument for immunity was "squarely foreclosed by the language of the FSIA." 504 U.S. at 616. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Id.* at 518.

In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) the Court again refused to expand upon the text of the FSIA to extend immunity to subsidiaries of an instrumentality of a foreign state. The Court held, "***The text*** of the FSIA gives no indication that Congress

intended us to depart from the general rules regarding corporate formalities." *Id.* at 476 (*emphasis supplied*). The following year, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court held that the rules judges should apply in resolving sovereign immunity claims could only be derived from the text and structure of the FSIA. 541 U.S. at 699. In a concurring opinion, Justice Breyer emphasized that "the literal language of the statute supports [the plaintiff]." 541 U.S. at 708. Justice Breyer refused to "read into § 1605(a)(3) qualifying language not contained in the statute." *Id.*

In *Samantar v. Yousef*, 560 U.S. 305 (2010), the lower courts expanded the statutory definition of "foreign state" to include individual officials of foreign states. Looking primarily to the text of the statute, the Court reversed. It held: " . . . Congress did not mean to cover other types of defendants never mentioned in the text." *Id.* at 319. Separate concurring opinions emphasized that the decision should have been limited to the textual analysis, which clearly indicated that individual officials were not included in the statutory definition and would not enjoy immunity. *Id.* at 326. Most recently, in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2256 (2014), the Court reaffirmed that foreign states enjoy only that immunity conferred by "the text of the Act." Because the text of the FSIA is silent as to immunity limiting discovery in aid of execution of a judgment, the Court refused to

recognize any such immunity. *Id.* "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.").

B. Section 1610(a) – The Commercial Use Exception To Execution Immunity.

28 U.S.C. § 1610(a), provides an exception to execution immunity for property of a foreign state when the property is used for commercial activity in the United States. The opening paragraph provides in part, "The property in the United States of a foreign state . . . ***used for a commercial activity*** in the United States, shall not be immune from attachment in aid of execution, or from execution. . . ." *Id.* (*emphasis supplied*). Section 1610(a) allows execution where one of seven enumerated conditions has been satisfied. 28 U.S.C. § 1610(a)(1)-(7). One of these conditions is that the judgment to be enforced relates to a claim for terrorism under 28 U.S.C. § 1605A, which is the terrorism exception to jurisdictional immunity. 28 U.S.C. § 1610(a)(7). The statute does not specify that the foreign sovereign itself must use the property for commercial activity; it merely specifies that the property must be so used. The question this petition raises under section 1610(a) is, as the court of appeals put it, "whose commercial use counts?" App.16. This is an important question that applies to enforcement of judgments against any foreign state, even those that are not designated state sponsors of terrorism. *See* § 1610(a)(1)-(6).

C. Section 1610(g) Was Enacted To Expand The Range Of Assets Available To Satisfy Terrorism Judgments.

Under the original attachment immunity provisions of the FSIA, 28 U.S.C. §§ 1609-1611, most terror victim plaintiffs who successfully obtained judgments against designated state sponsors of terrorism were subsequently drawn into what one judge described as "a long, bitter, and often futile quest for justice." *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009); *cf., Bank Markazi v. Peterson*, 136 S. Ct. at 1317-18 (2016). As the Ninth Circuit observed in its first decisions in *Bennett*:

> For years, the state-sponsored terrorism exception to the FSIA created an anomaly – it abrogated a foreign sovereign's immunity from judgment, but not its immunity from collection. Terrorism victims therefore had a right without a meaningful remedy.

Bennett I, 799 F.3d at 1284.

Two principal obstacles prevented terror victim judgment creditors from enforcing their judgments against Iran and other state sponsors of terrorism. The first obstacle was that "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Bank Markazi*, 136 S. Ct. at 1318; *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 52-53. Due to the lack of formal relations between the United States and state sponsors of terrorism, these

states owned very little property in the United States that satisfied the commercial use requirements. *See In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 53.

The second principal obstacle to enforcement of terror judgments against state sponsors of terrorism was that almost any Iranian assets that could be found in the United States had been blocked under various regulations and executive orders, and were in the control and possession of the United States government. *Id.* at 52. Thus, the sovereign immunity of our own federal government along with "a dizzying array of statutory and regulatory authorities" to which the blocked assets were subjected prevented judgment creditors from enforcing their judgments against these assets. *Id.* at 52-53.

Terrorism plaintiffs began targeting property in which Iran-owned entities held an interest. *Estate of Heisler v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 14 (D.D.C. 2011). This tactic, however, led the plaintiffs into a third obstacle to enforcement of their judgments, specifically, the application of this Court's decision in *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *See Estate of Heisler*, 807 F. Supp. 2d at 14. *Bancec* stands for the proposition that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-27. Thus as a rule, governmental corporations or other entities cannot be held liable for the debts of their foreign sovereign owners. *Id.* The

Bancec rule, like the limitation on execution against blocked assets or non-commercial assets often frustrated terror victim judgment holders' enforcement efforts. *See Estate of Heisler*, 807 F. Supp. 2d at 14.

Congress intervened to provide relief for terrorism victims holding judgments that were essentially unenforceable. *Bank Markazi*, 136 S. Ct. at 1318. One attempt to assist terrorism victims, was the enactment of the Terrorism Risk Insurance Act of 2002 (the "TRIA"), which allows terror victims to execute their judgments against the blocked assets of terrorist parties as well as those of the terrorist parties' agencies or instrumentalities. *Id.* However, as Judge Lamberth observed, "[i]n the case of Iran, . . . very few blocked assets exist." *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 58. Thus, TRIA offered limited relief to Iran's terrorism judgment creditors.

In 2008, Congress again legislated to help terrorism victims enforce their judgments. Congress amended the FSIA by, among other things, adding section 1610(g). The purpose of section 1610(g) was to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism and their agencies and instrumentalities. *Bank Markazi*, 136 U.S. at 1318 n.2. Courts have recognized the "broad remedial purposes" of section 1610(g), and agreed that "a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heisler*, 807 F. Supp. 2d at 26 (*emphasis supplied*). The

question here is, to what extent section 1610(g) "significantly expands" the range of assets available to enforce terrorism judgments.

Section 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

By all accounts, section 1610(g) abrogates *Bancec*, and at a minimum, enables terrorism judgments entered against a foreign state to be enforced against that state's juridically independent agencies or instrumentalities. App. 26. *Bennett III*, 825 F.3d at 958-59. However, the court below held that section 1610(g) accomplishes nothing more. In stark contrast, the Ninth Circuit held that in addition to abrogating *Bancec*, subsection (g) establishes an independent "terrorism" exception to execution immunity that allows attachment of all property of state sponsors of terrorism regardless of whether the property satisfies some other execution immunity provision. *Bennett III*, 825 F.3d at 960; App. 26. Despite the near-absolute range of assets subject to execution under *Bennett*, courts recognize, that unlike the TRIA, section 1610(g) "does not take precedence over 'any other provision of law.'" *Bank Markazi*, 136 S. Ct. 1318 n.2. Thus, for example, the FSIA's central bank immunity provision would trump section 1610(g). *Id.* Similarly, diplomatic property remains immune. *Wyatt v. Syrian Arab Republic*, 2015 U.S. Dist. LEXIS 46525 (D.D.C. 2015) ("property exempt from attachment under the [Vienna Convention on Consular Relations] is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611.").

III. Jurisdiction Of The Lower Courts.

The petitioners registered their Judgment for enforcement purposes in the United States District Court for the Northern District of Illinois pursuant to 28

U.S.C. § 1963. Thus, the district court below had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1330 and 1331.

The Northern District of Illinois entered its memorandum opinion and judgment on March 27, 2014. The petitioners filed their notice of appeal on April 25, 2014. The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

IV. Proceedings Below.

A. The Judgment.

Petitioners, United States nationals, initiated this post-judgment collection action in an attempt to enforce a money judgment entered against Iran for its sponsorship of a suicide bombing attack on a crowded pedestrian mall in Jerusalem, Israel, on September 4, 1997. *See Campuzano/Rubin*, 281 F. Supp. 2d 258 (D.D.C. 2003). Following a four-day trial, on September 10, 2003, the court entered judgment (the "Judgment") in favor of the petitioners, awarding them $71.5 million in compensatory damages against Iran.

B. The Enforcement Proceedings In The District Court For The Northern District Of Illinois.

The petitioners registered the Judgment in the United States District Court for the Northern District of Illinois on December 29, 2003. The petitioners

initiated enforcement proceedings against certain Persian artifacts (the "Artifacts") that were in the possession and use of respondents, the Oriental Institute of the University of Chicago (the "University") and the Field Museum of Natural History (the "Field Museum") (together, "the Museums"). The petitioners argued that they were authorized to enforce the Judgment against the Artifacts under the Commercial Activity Exception, 28 U.S.C. § 1610(a). The Artifacts were used for "commercial activity," as the Court defined that term in *Weltover*, 504 U.S. at 614 – referring to the "nature" of the activity, rather than its "purpose." Petitioners also claimed the Artifacts were subject to execution under the Terrorism Exception, 28 U.S.C. § 1610(g). Iran and the Museums moved for summary judgment arguing that neither of these provisions allowed execution against the Artifacts.

1. The petitioners asserted that section 1610(a) allowed them to attach and execute upon the artifacts because the artifacts satisfied all of the requirements for enforcement under section 1610(a): The Artifacts were property in the United States, belonging to Iran, and were being used by the Museums for commercial activity in the United States. The district court acknowledged that "Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign." App. 51.

The petitioners also explained that elsewhere in the FSIA, where Congress intended to restrict an immunity provision to activity of the foreign state, itself, Congress did so explicitly. Subsection 1605(a)(2), which

provides an exception to jurisdictional immunity, states clearly that no immunities lie where "the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." Petitioners argued that had Congress intended to limit section 1610(a) to property used by the foreign state, itself, Congress would have said so explicitly, as it did in section 1605. The district court found these arguments inconclusive. The court relied upon the FSIA's statement of purpose, codified at 28 U.S.C. § 1602 and general statements regarding the legislative history of the FSIA to impart meaning to section 1610(a). App. 52-54. Specifically, the district court found determinative a reference in section 1602 indicating that a foreign state's "commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." App. 53. The district court concluded that section 1610(a) applies only where the foreign sovereign itself uses the property for commercial activity within the United States.

2. Section 1610(g) refers to the "property of a foreign state." Unlike other provisions within section 1610, subsection (g) includes no restrictions based upon commercial use or activity. The district court however held that section 1610(g) applies only to attachment of and execution upon property that has otherwise lost its immunity. App. 61-62. The court found that construing section 1610(g) to allow attachment of ***all*** property of a state sponsor of terrorism would render superfluous subsections (a)(7) and (b)(3), both of

which allow attachment of commercial property pursuant to terrorism judgments. App. 60-61.

As urged by the United States, which had filed a statement of interest under 28 U.S.C. § 517, the district court held that the words "as provided in this section," located at the end of the opening paragraph of subsection (g)(1) were intended to limit the applicability of subsection (g) to execution against property that was otherwise excepted from immunity in section 1610. App. 61-62. Thus, the district court also held that section 1610(g) does not provide any new basis for attaching assets of foreign states. App. 62. It accepted the respondents' argument that section 1610(g) merely enables terrorism victim judgment creditors of foreign sovereigns to "pierce the corporate veil" and enforce their judgments against the agencies and instrumentalities of the foreign sovereigns. App. 62. The district court granted Iran's and the Museums' motions for summary judgment. App. 71.

C. The Seventh Circuit Affirms The Judgment Against The Petitioners.

1. The Seventh Circuit affirmed the judgment entered against the petitioners. App. 1-38. The court of appeals rejected petitioners' section 1610(a) argument that property of a foreign sovereign used for a commercial activity in the United States is subject to attachment regardless of who uses the property. App. 17. The court of appeals found that "the passive-voice phrasing of § 1610(a) creates uncertainty about whose

commercial use suffices to forfeit a foreign state's execution immunity." App. 18. Additionally, the court asserted that allowing execution based upon a third party's commercial use of the foreign state's property would result in execution immunity applying in situations where jurisdictional immunity does not. App. 19-20. This, the court held, would violate the "settled principle that the exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity." App. 20.

The Seventh Circuit asserted that it was joining an "emerging consensus" of three other courts of appeal that held that only use of property by the foreign state, itself, would trigger the execution immunity exception of section 1610(a). App. 16-17, *citing*, *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007). However, the petitioners had demonstrated that ***none*** of these cases either involved execution upon property of a foreign state used for commercial activity by a third party. Notably, the district court did not cite any of these decisions as authority for the proposition that only use of property by the foreign state could permit execution.

2. The Seventh Circuit also affirmed the district court's holding that section 1610(g) does not create a new immunity exception to facilitate enforcement of terrorism judgments. App. 35. The court seized upon

the "as provided in this section" language that the district court relied upon, and held that it specifically requires judgment creditors to satisfy some other provision of section 1610 before they may execute upon property of a state sponsor of terrorism. App. 27. The court also adopted the district court's understanding that construing section 1610(g) to create an independent immunity exception would render other provisions superfluous. App. 27-28.

The Seventh Circuit expressly rejected the Ninth Circuit's holding that section 1610(g) is an independent exception to execution immunity intended to allow terrorism victims to execute upon any of a defendant sovereign's United States assets. App. 32-35. Instead, the Seventh Circuit held that the only effect of section 1610(g) is to eliminate the *Bancec* barrier to enforcement of judgments by allowing terrorism victims to pursue assets of juridically independent agencies or instrumentalities of state sponsors of terrorism. App. 26, 35.

3. Seventh Circuit Rule 40(e) creates a mechanism for the court to *sua sponte* circulate an opinion for *en banc* consideration when the decision either creates a circuit split or overrules circuit precedent. *See* App. 35 n.6; App. 39. Below, in addition to creating the circuit split with the Ninth Circuit, the panel overruled two of the Seventh Circuit's own precedents, both of which had interpreted section 1610(g) as being an independent immunity exception. App. 34-35, *citing Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *see also Wyatt v. Syrian Arab Republic*, 800

F.3d 331 (7th Cir. 2015). Thus, the court's decision required circulation for consideration of *en banc* review under both prongs of Circuit Rule 40(e). However, because a majority of the active judges had been disqualified from hearing the case, it was impossible to garner the votes of a majority to rehear the case *en banc*. App. 36 n.6; App. 39. Without the possibility of rehearing *en banc*, the three-judge panel proceeded to enter its judgment. App. 36 n.6.

Judge Hamilton, who was not on the panel below but had authored the two decisions the court overruled, dissented from the denial of *en banc* review. App. 39. While reluctantly conceding that the panel had "the power to overrule circuit precedent and to create a circuit split," Judge Hamilton asserted that it was "a mistake" to do so. App. 39. His objection was based both upon the principle of *stare decisis* and on the merits. App. 39.

As to the merits, Judge Hamilton refrained from engaging in the textual arguments, which "are laid out in *Bennett* and *Rubin*." App. 41. However, because he concluded that section 1610(g) is ambiguous, Judge Hamilton cited *Bennett*'s finding that "the legislative history of 2008 amendments shows broad intent to facilitate execution of judgments against any property owned by state sponsors of terrorism." App. 41; *quoting Bennett*, 825 F.3d 961-62. Judge Hamilton concluded:

> We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also underserving beneficiaries

of the unusual steps taken by the *Rubin* panel.

App. 42.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Construing Section 1610(g) Warrants Review.

A. The Seventh Circuit Has Entered A Decision That Creates An Express And Broad Circuit Conflict On The Construction Of Section 1610(g).

The Seventh Circuit directly and explicitly disagreed with the Ninth Circuit's interpretation of section 1610(g). The Ninth Circuit held that section 1610(g) is an independent execution immunity exception that allows enforcement of judgments against any property of the foreign state, its agencies, and instrumentalities. *Bennett III*, 825 F.3d at 959. The Seventh Circuit held that section 1610(g) not an immunity exception at all, but merely a provision that enables plaintiffs to pierce the corporate veil of state-owned agencies and instrumentalities. App. 4. The court held that enforcement of judgments under section 1610(g) is available only against property that is otherwise subject to execution under section 1610. App. 35. Thus, *Rubin* limits section 1610(g) execution to commercial property only. *Bennett* does not require that the property have any nexus to commercial use or activity. *Bennett III*, 825 F.3d at 959-60. The gap between these conflicting

interpretations of section 1610(g) is vast, and should be resolved now.

The proper construction of section 1610(g) was thoroughly considered in both courts, and its determination was case-dispositive in the Seventh Circuit. The Ninth Circuit issued three decisions on the question, eliciting a dissenting opinion in two of them. The Seventh Circuit's ruling overturned two of that court's own precedents, leading Judge Hamilton to dissent from the court's denial of rehearing *en banc*.

Following its dramatic turnabout ruling in *Rubin*, the Seventh Circuit is now alone in its extremely narrow construction of the section 1610(g). The Ninth Circuit, however, was recently joined by the District of Columbia and Second Circuits both of which held that section 1610(g) permits execution upon *all* property of foreign state sponsors of terrorism. *See Weinstein v. Islamic Republic of Iran*, __ F.3d __, 2016 WL 4087940, *8 (D.C. Cir. 2016) (section 1610(g) strips execution immunity from ***all*** property of a defendant sovereign.) (*emphasis in original*); *Kirschenbaum v. 650 Fifth Avenue*, 830 F.3d 107, 123 (2d Cir. 2016) (*same*). The Executive Branch supports the Seventh Circuit's *Rubin* decision, filing briefs in support of Iran's position in both *Rubin* and *Bennett*. The issue is ripe for Supreme Court review.

B. Establishing The Correct Meaning Of § 1610(g) Is Important.

Establishing the correct meaning of section 1610(g) is important. Before Congress intervened on behalf of terrorism victims, these plaintiffs faced difficulties trying to enforce their judgments against Iran. *See Bank Markazi*, 136 S. Ct. at 1317-18; *supra Part* II.C. The only property available for the satisfaction of judgments was foreign state property located in the United States, and "used for a commercial activity" – property that was subject to attachment under section 1610(a)(7). *Bank Markazi*, 136 S. Ct. at 1318. Note that the *Rubin* holding requires that terrorism plaintiffs remain limited to recovery only from property used for commercial activity (except, possibly, as provided in the TRIA which pertains only to blocked assets. *See* 28 U.S.C. § 1610, *note*).

Section 1610(g) was specifically intended to remove the remaining obstacles to terrorism judgment enforcement. *See Bank Markazi*, 136 S. Ct. 1318 n.2. The Ninth Circuit quoted a House Conference Report stating that the new law would subject to execution "any property in which the foreign state has a beneficial ownership." *Bennett III*, 825 F.3d at 962, *quoting* H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). And, it quoted one of the sponsors of the bill that became § 1610(g) as saying foreign state defendants are subject to attachment based upon "the satisfaction of a simple ownership test." *See id., quoting* 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). Other courts agree. "[A] core purpose of [section

1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heisler*, 807 F. Supp. 2d at 26; *see also, Weinstein v. Islamic Republic of Iran*, ___ F.3d ___, 2016 WL 4087940, *8 (D.C. Cir. 2016).

This "core purpose" can only be satisfied if section 1610(g) is correctly understood and uniformly applied. As Judge Hamilton wrote in his dissent from the denial of *en banc* review, the Seventh Circuit's erroneous and narrow construction of section 1610(g) "has important practical consequences." App. 39. Most important, the *Rubin* panel's reading of section 1610(g) restricts rather than expands the availability of assets for postjudgment execution. App. 39. Thus, the Seventh Circuit would return plaintiffs to the "long, bitter, and often futile quest for justice" that plagued them before Congress enacted 1610(g). *See In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009); *supra* Part II.C.

C. The Seventh Circuit's Construction Of Section 1610(g) Is Wrong.

Rubin is an aberration among the decisions addressing the meaning and scope of section 1610(g). A review of the statutory text reveals why no other courts of appeals agree with the Seventh Circuit's latest pronouncement on this provision.

The opening clause of section 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), ***the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state***, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment ***as provided in this section***, regardless of [the five *Bancec* factors].

(*emphasis supplied*).

The Seventh Circuit's holding is based entirely upon five words in the statute: "as provided in this section." App. 26-35. The Seventh Circuit held that those five words can only be understood to incorporate every other provision of section 1610 into subsection 1610(g). App. 27. Accordingly, the court held that section 1610(g) requires terrorism plaintiffs to satisfy some other provision of section 1610 that allows execution. The Ninth Circuit explained that the phrase, "as provided in this section," refers to procedures contained in section 1610(f). *Bennett III*, 825 at 959. The Seventh Circuit rejected this interpretation as "highly strained." App. 33. However, the Seventh Circuit's decision fails to account for numerous textual elements that render its own construction not only strained, but unintelligible.

Assume that the Seventh Circuit correctly held that section 1610(g) merely "removes the *Bancec* barrier," which requires FSIA plaintiffs to overcome the presumption that government instrumentalities established as separate juridical entities are to be treated as legally distinct from the foreign sovereign. App. 4. Now, consider the opening clause of section 1610(g), quoted above. It refers to three categories of property: (i) "property of a foreign state against which a judgment is entered under section 1605A;" (ii) "property of an agency or instrumentality of such a state;" and (iii) "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." Removing the *Bancec* barrier merely enables judgments against foreign states to be enforced against the states' juridically independent agencies and instrumentalities. Thus, it is reasonable that the statute would allow execution upon property that falls into category (iii).

But, the Seventh Circuit's construction cannot account for the statute's inclusion of categories (i) and (ii). The *Bancec* barrier could never interfere with execution upon "property of a foreign state" for purposes of enforcing a judgment entered against that very state. It is absurd to even discuss the separate entity rule in such a case. The same holds true for "property of an agency or instrumentality" that is not separate juridical entity (i.e., category (ii)). There is neither a need nor a possibility of removing a separate entity barrier when there is no separate entity. When judgment creditors seek to enforce their judgments against

property of the state defendant, itself, or against property of agencies and instrumentalities that are not juridically separate, it is incongruous to even discus removing the *Bancec* barrier. The Ninth Circuit and other courts were correct in rejecting the Seventh Circuit's construction of 1610(g).

The Seventh Circuit understood that treating section 1610(g) as an independent immunity exception would render subsections 1610(a)(7) and 1610(b)(3) superfluous. Those sections permit enforcement of terrorism judgments under the commercial property exceptions to execution immunity. The Seventh Circuit is wrong. Section 1610(g) applies only to enforcement of judgments entered under the new terrorism exception to jurisdictional immunity, 28 U.S.C. 1605A. It does not apply to judgments under the former terrorism exception, 1605(a)(7). *See* 28 U.S.C. 1610(g)(1). By contrast, subsections 1610(a)(7) and (b)(3) apply to enforcement under either provision.

The Ninth Circuit responded to this argument by pointing out that "the tension" between the commercial use provisions and subsection (g) "works in the opposite direction." *Bennett III*, 825 F.3d at 960. Section 1610(g) allows execution upon the "property" of the foreign state or its instrumentality. *Id.* It contains no reference to commercial use or activities. Reading into section 1610(g) a commercial use or commercial activity requirement would create limitations that Congress did not insert. *Id.*

The Seventh Circuit's construction of section 1610(g) renders much of the statute not only superfluous, but absurd. The text, policy, and history of section 1610(g) demonstrate that the statute ***both*** removes the Bancec barrier ***and*** creates an independent execution immunity exception as the Ninth Circuit held.

D. This Case Presents The Ideal Vehicle For Resolving The Circuit Split.

1. This case presents the ideal vehicle for resolving the circuit split over the question of whether section 1610(g) creates an independent execution immunity exception. The question presented was squarely addressed by the court of appeals. App. 21-35. And, the court's answer to the question was outcome determinative. As the Ninth Circuit held, under section 1610(g), "[t]he only requirement [for execution] is that property be 'the property of' the foreign state or its instrumentality." *Bennett III*, 825 F.3d at 960.

2. Additionally, the unique facts of this case will enable the Court to test the full scope of the 1610(g) immunity exception. This case has proceeded until now with a very large elephant in the room – the Iranian property upon which the petitioners seek to execute are antiquities that have been in the possession of the University of Chicago for eighty years. Many consider property of this nature to be sacrosanct and not appropriate for attachment and execution. *See Bennett III*, 825 F.3d at 969 (Benson D.J. dissenting).

To demonstrate, in the *Bennett* rehearing, Iran urged the Ninth Circuit to construe section 1610(g) narrowly to prevent the petitioners in *Rubin* from using the Ninth Circuit's ruling as precedent to execute upon Artifacts in Chicago. *See id.* At that time, this case was already pending in the Seventh Circuit. *Id.* Iran understood that it could influence the *Bennett* court's construction of the statute with an outcome-oriented argument focused on the threat that the court's decision in *Bennett* might render the Artifacts in *Rubin* subject to execution.

Iran's tactic was partially successful. *See id.* Chief District Judge Benson adopted this argument in his dissenting opinion; he argued that allowing the seizure of the Persian artifacts "would be an unfortunate and unjust result." *Id.* The *Bennett* majority dismissed Chief District Judge Benson's concerns: "it is not our province to decide whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern congressional intent." *Bennett III*, 825 F.3d 960 n.6.

Judge Benson's distress over the Artifacts was unjustified. The petitioners never sought to wantonly "auction off" the Artifacts. They consistently requested that the court appoint a receiver to identify appropriate institutional purchasers, such as museums or universities. Petitioners also maintained that Iran itself could redeem the Artifacts by paying the judgment, which would obviate any "unfortunate and unjust results," not the least of which being that American victims of Iranian terrorism remain with an unenforced

judgment nearly 20 years following the attack that gave rise to Iranian liability.

The very fact that Iran raised concerns about permitting attachment of antiquities in the Ninth Circuit – while *Rubin* was still pending in the court below, and the fact that both the *Bennett* majority and dissent felt compelled to address this concern, demonstrate that the *Rubin* case is an ideal vehicle for resolving this circuit split. Determining whether the Artifacts are subject to execution will test the outer limits of the Ninth Circuit's holding that section 1610(g) allows execution upon ***all*** Iranian property.

As discussed above (Part II.C., *supra*), because section 1610(g) does not override other law, even under *Bennett*, some restrictions on execution would remain, including the FSIA's central bank immunity provision and prohibitions against attachment and execution upon diplomatic property. *See Bank Markazi*, 136 S. Ct. 1318 n.2; *Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192 (D.D.C. 2015).

II. Declaring A Consensus As To The Meaning Of Section 1610(a), The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

The court's holding on 1610(a) presents an important question of federal law that has not been, but should be, settled by this Court for at least three fundamental reasons. *First*, this Court has repeatedly

admonished parties and the lower courts that an unambiguous statutory text resolves any questions regarding its proper construction. *See* Part II.A., *supra*. The Seventh Circuit abandoned the plain meaning of section 1610(a), looking instead to other sources to create, and then resolve, ambiguity. The Court should reaffirm its prior holdings that the FSIA, like any other statute, must be construed according to a plain reading of the text.

Second, by declaring "consensus" among the federal courts of appeal when, in fact, none exists, the court's decision will have the effect of preempting further consideration of this question by other courts, both because parties will be deterred from raising it, and because the courts will simply fall into line with the false consensus. This is particularly troubling because the Seventh Circuit's construction of the statute is at odds with Congressional intent as expressed in the statutory text.

Third, section 1610(a) potentially applies to enforcement proceedings against any foreign state judgment debtor. Its proper construction is likely to influence the outcome in a wide variety of cases. *See* § 1610(a)(1)-(7). To ensure that one appellate panel does not unilaterally establish as settled law an erroneous interpretation of section 1610(a) that would impact so many cases the Court should resolve this important question.

A. The Seventh Circuit Interpretation Of Section 1610(a) Requires Review.

The opening paragraph of section 1610(a) provides in part, "The property in the United States of a foreign state . . . ***used*** for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution. . . ." *Id.* (*emphasis supplied*). The statute does not specify that the foreign sovereign itself must use the property for commercial activity; it merely specifies that the property must be so used. Indeed, the district court acknowledged that "Section 1610 does not explicitly limit the executional immunity exception to activity conducted solely by the sovereign." App. 51.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 194 (1984). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (*citations omitted*). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 450.

The Supreme Court's insistence upon strict adherence to statutory text has been particularly forceful in

its FSIA jurisprudence. The Court has consistently and repeatedly admonished against reading unintended and non-textual restrictions into the FSIA. Most recently, in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014), the Court held that "any sort" of immunity defense rises or falls on the Act's text alone. *NML Capital* quoted from the Court's earlier pronouncement in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992): "the question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." 134 S. Ct. at 2258. Again, the text, as enacted by Congress governs.

2. The Seventh Circuit held that section 1610(a)'s use of the passive voice ("property . . . used for a commercial activity") raises the question: "Whose commercial use counts?" App. 16. On the contrary, as this Court has held, the passive voice does not raise the question, it ***preempts*** the question.

In *Dean v. United States*, 556 U.S. 568, 572 (2009), the Court interpreted 18 U.S.C. § 924, which, among other things, "criminalizes using or carrying a firearm in relation to any violent or drug trafficking crime or possessing a firearm in furtherance of such a crime." *Dean*, 556 U.S. at 570. Section 924(c)(1)(A) increases the mandatory minimum sentence if the firearm "is brandished [or] discharged." This sentencing provision employs a passive voice.

The *Dean* Court rejected the defendant's argument that the statute required proof that the defendant intended to discharge the firearm. "The passive

voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572. The passive voice did not create ambiguity. It provided the Court with the tools for reading the statute according to its terms. It did not raise the question; it resolved the question.

In *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011), the Ninth Circuit followed *Dean* when it interpreted the FSIA's expropriation exception, which provides that a foreign state is not immune in certain cases "in which rights in property taken in violation of international law are in issue. . . ." 28 U.S.C. § 1605(a)(3). The court held that even though Spain was not the foreign state that expropriated the property, the jurisdictional immunity exception was satisfied. The court found that the "plain language of the statute does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law." 616 F.3d at 1028. Citing the Supreme Court's decision in *Dean*, the court held: "The text is written in the passive voice, which focuses on an event that occurs without respect to a specific actor." *Id.*

3. Dismissing *Dean* and ignoring *Cassirer*, the Seventh Circuit claimed that section 1610(a) could only be construed by reference to 28 U.S.C. § 1602, the FSIA's Findings and Declaration of Purpose. App. 17-18. The court quoted one sentence from section 1602. App. 17:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

The court focused on the references to foreign states' commercial activities, and for emphasis, italicized the word "their" everywhere it appears in the quoted sentence. App. 17. The Seventh Circuit concluded from the italics-enhanced excerpt from section 1602 that section 1610(a) cannot be construed as written – to permit execution upon foreign states' property regardless of who uses it. App. 17-18. The court's reasoning is flawed.

The court italicized words that Congress did not emphasize and misconstrued section 1602. The purpose of the FSIA is not, as the Seventh Circuit held, to prevent execution upon foreign state's property used by others. *See* App. 17. Rather as this Court has held, the dual purposes of the FSIA, as stated in section 1602, are: (1) to endorse and codify the "restrictive theory" of sovereign immunity (which restricts immunity, not the exceptions to immunity), and (2) to transfer primary responsibility for deciding claims of foreign states to immunity from the Executive Branch to the courts. *See Samantar*, 560 U.S. at 313. Thus, even if one were to look to the statutory Findings and Statement of Purpose to construe an otherwise unambiguous statute, section 1602 provides no guidance.

B. This Case Presents The Ideal Vehicle For Determining Whether Only Use By The Foreign State Subjects Property To Execution Under § 1610(a).

This case is not only a proper vehicle for resolving the 1610(a) question, it is probably the last chance for any court to explore the issue. As discussed above, the court of appeals declared a consensus among the federal appellate courts on this question. *Supra*, Part II.C. Also, as discussed above, none of the courts claimed to be part of this "consensus" dealt with the issue.

Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002) ("*CBC*"), involved a bank's attempt to garnish royalty and tax payments *owed to* the Republic of Congo by certain Texas oil companies pursuant to a joint venture. *Id.* at 246, 251. The court held that the royalties and payments were never "used for commercial activity." *Id.* at 257. They were the proceeds of that activity.

The court inserted a footnote containing a hypothetical and observed: "Even the bank appears to recognize that what matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property in the past. Any property a "foreign state purchases from a private supplier will necessarily be used for commercial purpose by that supplier." *CBC*, 309 F.3d at 256 n.5. Note that in the court's hypothetical, when the supplier uses the property (to generate revenues) the property is not yet the property of the foreign state purchaser. Thus, the

property in the hypothetical falls outside the reach of section 1610(a), not because the use is not made by the state, but because when the property is used, it does not belong to the foreign state.

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007), also claimed to be part of the "consensus," is based upon the same material facts as *CBC*, above. *See* 475 F.3d at 1084-85. *Af-Cap* is therefore easily distinguishable for the same reasons as *CBC*. Similarly, in *Aurelius Capital Partners, L.P. v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009), the court found that the assets in question had not been used for ***any*** purpose at all while they belonged to the state-owned instrumentality. 584 F.3d at 131. Not one of these cases cited by the Seventh Circuit as constituting an emerging consensus addressed the question presented here.

Future plaintiffs reading the Seventh Circuit's decision declaring a consensus would never attempt to attach and execute upon property of the foreign state defendant that is put to a commercial use by others. Similarly, assuming any plaintiffs even tried to enforce a judgment against such assets, lower courts would automatically fall into line with the false consensus.

To be sure, certainty and uniformity in the law are desirable. But, that is so only when the result is consistent with Congressional intent as expressed in the text of the statute. Here, the Seventh Circuit, ignored countless precedents of this Court and abandoned the text of section 1610(a), read a non-existent restriction

into the statute, and then unilaterally declared its holding to represent an "emerging consensus." Certainty and uniformity resulting from such a decision are damaging to the rule of law. Only this Court is able to set the record straight and restore to section 1610(a) its proper meaning.

CONCLUSION

To uphold both the text and the purpose of the FSIA's attachment immunity provisions; to resolve the circuit split and correct the erroneous holding of the Seventh Circuit as to section 1610(g); and to prevent a three-judge panel from declaring a national consensus on an important issue other courts have not even considered, the Court should grant the petition for a writ of certiorari and overrule both of these holdings of the Seventh Circuit.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 14-1935

JENNY RUBIN, *et al.*,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN,

Defendant-Appellee,

and

FIELD MUSEUM OF NATURAL HISTORY, *et al.*,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 9370 – **Robert W. Gettleman**, *Judge.*

ARGUED APRIL 23, 2015 – DECIDED JULY 19, 2016

Before BAUER and SYKES, *Circuit Judges*, and REAGAN, *Chief District Judge.**

SYKES, *Circuit Judge.* In September 1997 three Hamas suicide bombers blew themselves up on a

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* Of the Southern District of Illinois, sitting by designation.

crowded pedestrian mall in Jerusalem. Among those grievously injured were eight U.S. citizens who later joined with a handful of their close relatives to file a civil action against the Islamic Republic of Iran for its role in providing material support to the attackers. Iran was subject to suit as a state sponsor of terrorism under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), then codified at 28 U.S.C. § 1605(a)(7). A district judge in the District of Columbia entered a $71.5 million default judgment. Iran did not pay.

So began more than a decade of unsuccessful litigation across the country to attach and execute on Iranian assets in order to satisfy the judgment. *See Rubin v. Islamic Republic of Iran*, No. Civ. A. 01-1655 (RMU), 2005 WL 670770, at *1 (D.D.C. Mar. 23, 2005), *vacated*, 563 F. Supp. 2d 38 (D.D.C. 2008) (granting and then vacating writs of execution against two domestic bank accounts used by Iranian consulates); *Rubin v. Islamic Republic of Iran*, 810 F. Supp. 2d 402 (D. Mass. 2011), *aff'd*, 709 F.3d 49 (1st Cir. 2013) (rejecting an effort to attach Iranian antiquities in the possession of various museums); *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014) (same). This appeal concerns the last decision on this list.

The plaintiffs sought to execute on four collections of ancient Persian artifacts located within the territorial jurisdiction of the Northern District of Illinois: the Persepolis Collection, the Chogha Mish Collection, and the Oriental Institute Collection, all in the possession

of the University of Chicago; and the Herzfeld Collection, split between the University and Chicago's Field Museum of Natural History. The case was last here on some procedural issues early in the attachment proceeding. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). It now returns on the merits.

A foreign state's property in the United States is immune from attachment and execution, *see* 28 U.S.C. § 1609, but there are a few narrow exceptions. The plaintiffs identified three possible paths to reach the artifacts: subsections (a) and (g) of 28 U.S.C. § 1610, both part of the FSIA; and section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note), which permits holders of terrorism-related judgments to execute on assets that are "blocked" by executive order under certain international sanctions provisions. The district court entered judgment against the plaintiffs, finding no statutory basis to execute on the artifacts.

We affirm. The assets are not blocked by existing executive order, so execution under TRIA is not available. Nor does § 1610(a) apply. That provision permits execution on a foreign state's property "used for a commercial activity in the United States." We read this exception to require commercial use by the foreign state itself, not a third party. Iran did not put the artifacts to any commercial use.

Lastly, § 1610(g) is not itself an exception to execution immunity. Instead, it partially abrogates the so-called *Bancec* doctrine, which holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626-29 (1983). The *Bancec* rule can be overcome in two ways: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work an injustice. *Id.*

Section 1610(g) lifts the *Bancec* rule for holders of terrorism-related judgments, allowing attachment in aid of execution "as provided in this section" without regard to the presumption of separateness – that is, without the requirement of establishing alter-ego status or showing an injustice. The phrase "as provided in this section" refers to the immunity exceptions found elsewhere in § 1610, one of which must apply to overcome execution immunity. So although subsection (g) substantially eases the enforcement process for terrorism victims by removing the *Bancec* barrier, it is not a freestanding terrorism exception to execution immunity.

I. Background

The artifacts at issue here arrived in the United States over a 60-year timespan beginning in the 1930s. In 1937 Iran loaned the Persepolis Collection – roughly

30,000 clay tablets and fragments containing some of the oldest writings in the world – to the University of Chicago's Oriental Institute for research, translation, and cataloguing. In 1945 the Field Museum purchased a collection of approximately 1,200 prehistoric artifacts from Dr. Ernst Herzfeld, a German archaeologist active in Persia in the early 20th century (the Herzfeld Collection). In the 1960s Iran excavated clay seal impressions from the ancient Chogha Mish settlement and loaned them to the University's Oriental Institute for academic study (the Chogha Mish Collection). Most items in this collection were returned to Iran in 1970, but the University has since located some objects previously missing from the collection. In the 1980s and 1990s, the Oriental Institute received several small donations of Persian artifacts from Iran and other donors. These artifacts are not really a discrete collection, but the parties refer to them as the "Oriental Institute Collection," so we'll do the same.

The plaintiffs are American victims of a suicide-bomb attack carried out by Hamas in Jerusalem on September 4, 1997, with material support from Iran. In 2003 the survivors and their close family members filed suit against Iran in federal court in the District of Columbia, proceeding under the terrorism exception to jurisdictional sovereign immunity, then codified at § 1605(a)(7) of the FSIA. (In January 2008 Congress repealed § 1605(a)(7) and enacted a new terrorism exception to jurisdictional sovereign immunity codified

at 28 U.S.C. § 1605A. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083,122 Stat. 3, 338-44.)

The plaintiffs won a $71.5 million default judgment, *see Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003), and quickly commenced enforcement actions around the country in an effort to collect. As relevant here, the plaintiffs registered the judgment in the Northern District of Illinois, initiating attachment proceedings for the purpose of executing on the four collections then in the possession of the University and the Field Museum.[1] (We'll refer to the University and the Field Museum collectively as "the Museums" unless the context requires otherwise.)

Significant procedural battles ensued. We resolved these disputes in our earlier opinion and need not repeat that litigation history. *See Rubin*, 637 F.3d at 786-89. For present purposes it's enough to note that the plaintiffs initially proposed two possible ways to overcome Iran's execution immunity. First, they invoked § 1610(a), the "commercial activity" exception to execution immunity. Second, they pointed to TRIA, which permits execution on the blocked assets of a state sponsor of terrorism (or its agency or instrumentality) to satisfy a judgment obtained under the terrorism exception to jurisdictional sovereign immunity.

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[1] The plaintiffs later converted their § 1605(a)(7) judgment to one under § 1605A. *See Rubin v. Islamic Republic of Iran*, 270 F.R.D. 7, 9 & n.3 (D.D.C. 2010).

After we sent the case back to the district court, the parties engaged in discovery on the four collections, and Iran and the Museums moved for summary judgment. The district judge granted the motion. First, he rejected the plaintiffs' claim that the artifacts are subject to execution under § 1610(a). The judge read this exception as limited to property used for a commercial activity by *the foreign state itself*. Because Iran hadn't used the artifacts for commercial activity, the judge held that § 1610(a) does not apply.

The judge also held that because the assets in question are not blocked – i.e., frozen – by any current executive order, execution under TRIA is likewise unavailable.

Finally, in their response to the summary-judgment motion, the plaintiffs identified a third possible path to reach the artifacts: § 1610(g), which they argued is an independent exception to execution immunity available to victims of state-sponsored terrorism. The judge rejected this argument too, concluding that subsection (g) abrogates the *Bancec* rule for terrorism-related judgments but is not a freestanding terrorism exception to execution immunity.

Finding no statutory basis to execute on the artifacts, the judge entered judgment for Iran and the Museums. The plaintiffs appealed, reprising all three arguments.

II. Discussion

A. Which Artifacts Remain at Issue?

Our first task is to identify which of the four collections is even potentially subject to attachment and execution at this juncture. Two basic criteria apply: (1) the artifacts must be owned by Iran, and (2) the artifacts must be within the territorial jurisdiction of the district court. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014) ("Our courts generally lack authority in the first place to execute against property in other countries. . . .") (citation omitted); *see also Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.").

There's no dispute that the Persepolis Collection is owned by Iran and is in the physical possession of the University. The three other collections, however, are outside the reach of this proceeding for reasons relating to their present location or the absence of Iranian ownership.

As we've just explained, when the district court entered judgment, the University had possession of remnants of the Chogha Mish Collection. But intervening developments have placed these artifacts beyond the grasp of the federal courts. After filing their notice

of appeal, the plaintiffs asked us to stay the district court's judgment pending appeal. We denied the motion. The State Department then informed the University that the United States was obligated to return the Chogha Mish artifacts to Iran. The University, in turn, notified us that it would return the Chogha Mish artifacts to Iran within 45 days unless the court ordered otherwise. We did not order otherwise. So the University delivered the artifacts to Iran's National Museum in Tehran and filed notice with the court that Iran received and accepted them. Accordingly, the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court.

The Herzfeld and the Oriental Institute Collections remain within the court's territorial jurisdiction, but they are not Iranian property. The plaintiffs have tried to cast doubt on the legitimacy of their removal from Iran, arguing that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran's National Heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. The Museums, on the other hand, maintain that they were bona fide purchasers or recipients of these collections; the plaintiffs have not meaningfully contested this point.

We don't need to resolve any questions about the provenance of the Herzfeld and Oriental Institute Collections or explore the circumstances under which the Museums acquired them. As the plaintiffs concede,

Iran has expressly disclaimed any legal interest in the two collections, and the district judge found that no evidence supports Iranian ownership of these artifacts. The plaintiffs have not given us any reason to disturb this ruling, and we see none ourselves.

Because the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court and Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections, we confine our merits review to the Persepolis Collection.

B. Statutory Framework

We traced the history of the foreign sovereign immunity doctrine and the enactment of the FSIA in our earlier opinion. *See Rubin*, 637 F.3d at 792-94. A brief repetition is helpful to a proper understanding of the statutory-interpretation questions presented here.

Foreign sovereign immunity "is a matter of grace and comity on the part of the United States," and for much of our nation's history was left to the discretion of the Executive Branch. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). As such, federal courts "consistently . . . deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* Under the common-law doctrine, a diplomatic representative of the foreign state would request a "suggestion of immunity" from the State Department, and if the State Department obliged, the

court would surrender jurisdiction without further inquiry; absent a suggestion of immunity, the court would decide the immunity question itself based on policies established by the State Department. *Rubin*, 637 F.3d at 793. Either way, "[t]he process . . . entailed substantial judicial deference to the Executive Branch." *Id.*

Even if a court acquired jurisdiction and awarded judgment against a foreign state, "the United States gave absolute immunity to foreign sovereigns from the execution of judgments." *Autotech*, 499 F.3d at 749. Successful plaintiffs had to rely on voluntary payment by the foreign state. *Id.*

In 1952 the State Department adopted a "restrictive" theory of foreign sovereign immunity, conferring jurisdictional immunity in cases arising out of a foreign state's "public acts" but withholding it in "cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. "Under the restrictive, as opposed to the 'absolute,' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993). Even under this theory, however, foreign sovereign property remained absolutely immune from execution. *Autotech*, 499 F.3d at 749.

The State Department's shift to the restrictive theory of jurisdictional immunity "'[thr[ew] immunity

determinations into some disarray,' since 'political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available.'" *NML Capital*, 134 S. Ct. at 2255 (brackets in original) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004)). Essentially, "sovereign immunity determinations were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488.

In 1976 Congress stepped in and enacted the FSIA, which "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). The Act establishes a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488. "The key word . . . is *comprehensive*." *NML Capital*, 134 S. Ct. at 2255. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 2256.

The Act codifies the two common-law immunities we've just discussed – jurisdictional immunity (28 U.S.C. § 1604) and execution immunity (*id.* § 1609). Only the latter is at issue here. Section 1609 states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611

of this chapter." Accordingly, the Persepolis Collection is immune from attachment and execution unless an exception listed in § 1610 applies. (Section 1611 of Title 28 of the U.S. Code lists exceptions to the exceptions and is not implicated here.)

The most prominent are the so-called commercial-activity exceptions found in subsections (a) and (b) of § 1610. Under § 1610(a) a person who holds a judgment against a foreign state may execute it on the foreign state's property "used for a commercial activity in the United States" *if* one of seven listed conditions is met. Similarly, under § 1610(b) a person who holds a judgment against a foreign state's instrumentality may execute it on "any property in the United States of [the] . . . instrumentality . . . engaged in commercial activity in the United States" *if* one of three listed conditions is met.

So to summarize, at common law execution immunity was absolute, *Autotech*, 499 F.3d at 749, but subsections (a) and (b) of § 1610 together codify a narrower version of the restrictive theory of jurisdictional immunity for the execution of judgments, allowing successful claimants to attach and execute on foreign sovereign property "used for a commercial activity" in this country, at least in some circumstances.[2]

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[2] Section 1610 also permits in rem execution of certain foreclosure judgments against a foreign state's vessels. 28 U.S.C. § 1610(e). Other parts of § 1610 address, for example, certain procedural requirements for execution, *see, e.g.*, *id.* § 1610(c), and the

The plaintiffs point to § 1610(a) and § 1610(g) as possible paths to reach the artifacts. They also rely on section 201(a) of TRIA. We turn to these arguments now.

C. 28 U.S.C. § 1610(a)

As we've just explained, § 1610(a) establishes rules for executing a judgment against a foreign state on the foreign state's property; § 1610(b) establishes rules for executing a judgment against a foreign state's instrumentality on the instrumentality's property. The judgment here is against Iran, and Iran owns the Persepolis Collection, so subsection (a) is the relevant subsection.

Generally speaking, § 1610(a) permits the holder of a judgment against a foreign state to execute on property of the foreign state "used for a commercial activity in the United States" but only if one of seven enumerated conditions is satisfied. For example, a judgment creditor may proceed against a foreign state's property "used for a commercial activity in the United States" if the foreign state has expressly or impliedly waived execution immunity, § 1610(a)(1); or if the property in question "was used for the commercial activity upon which the claim is based," § 1610(a)(2); or if "the judgment is based on an order confirming an arbitral award," § 1610(a)(6).

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sensitive matter of prejudgment attachment of foreign sovereign property, *id.* § 1610(d).

At issue here is subsection (a)(7), which permits attachment and execution if the following terms are met:

> **(a)** The *property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune* from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, *if* –
>
> . . .
>
> > **(7)** *the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)* [the present and former terrorism exceptions to jurisdictional immunity] . . . regardless of whether the property is or was involved with the act upon which the claim is based.

§ 1610(a)(7) (emphases added).

The plaintiffs obtained their judgment against Iran in 2003 under § 1605(a)(7), the terrorism exception to jurisdictional immunity then in effect. In 2008 Congress replaced § 1605(a)(7) with § 1605A, and the plaintiffs converted their judgment to one under the new statute. So there's no question that the special condition in subsection (a)(7) is satisfied.

That leaves the basic "commercial activity" requirement of § 1610(a). The dispute here centers on the key statutory phrase identifying the property that may

be subject to execution under this exception: "property in the United States of a foreign state . . . used for a commercial activity in the United States." § 1610(a). The passive-voice phrasing of this sentence raises an interpretive question: *Used by whom?*

The plaintiffs contend that *a third party's* commercial use of the property triggers § 1610(a) and that the University's academic study of the Persepolis Collection counts as a commercial use. Iran and the University counter that the foreign state *itself* must use its property for a commercial activity, and regardless, academic study isn't a commercial use. The United States has weighed in as an amicus curiae on the side of the interpretation urged by Iran and the University – namely, that the exception in § 1610(a) applies *only* when the foreign sovereign itself (not a third party) uses the property for a commercial activity.

We're skeptical that academic study qualifies as a commercial use, but we'll put that question aside and focus on the antecedent one: *Whose commercial use counts?*

The Fifth Circuit has held that § 1610(a) is triggered only when the foreign state *itself* uses its property in the United States for a commercial activity. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("[W]hat matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property.").

The Second and Ninth Circuits agree. *See Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120,

131 (2d Cir. 2009) ("The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry. . . . [B]efore the retirement and pension funds at issue could be subject to attachment, the funds *in the hands of the Republic* must have been 'used for a commercial activity.'"); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007) (adopting the Fifth Circuit's interpretation).

We think these circuits have understood § 1610(a) correctly. It's true that a legislature's use of the passive voice sometimes reflects indifference to the actor. *See Dean v. United States*, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor. . . ."). But attributing indifference to Congress in this instance would be inconsistent with the FSIA's statutory declaration of purpose, which explicitly invokes the international law understanding of foreign sovereign immunity: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." 28 U.S.C. § 1602 (emphases added).

Section 1602 thus instructs courts to interpret the immunities and exceptions in the FSIA against the backdrop of the international law norm that foreign sovereigns do not have immunity for "*their* commercial activities" or immunity from execution on "*their* commercial property." This suggests that a foreign

sovereign's property is subject to execution under § 1610(a) only when the sovereign *itself* uses the property for a commercial activity. While the passive-voice phrasing in § 1610(a) introduces some ambiguity about whose commercial use matters, § 1602's declaration of purpose clarifies that foreign states may lose execution immunity only by virtue of *their own* commercial use of their property in the United States, not a third party's.

The plaintiffs object that the declaration of purpose isn't relevant because resort to legislative history is not necessary when the statutory language is unambiguous. We disagree for two reasons. First, § 1602 is *legislation*, not legislative history. It was written, debated, and enacted by Congress and signed into law by the President – in the same manner and at the same time as § 1610. None of the standard objections to judicial reliance on legislative history inhibit our resort to a *statutory* declaration of purpose for help in interpreting a part of the statute to which it applies.[3]

Second, as we've just noted, the passive-voice phrasing of § 1610(a) creates uncertainty about *whose* commercial use of the property suffices to forfeit a foreign state's execution immunity. The text itself raises the question, and the uncertainty is all the more apparent when subsection (a) is considered in its broader statutory context. *See King v. Burwell*, 135 S. Ct. 2480,

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[3] We're not suggesting, however, that a legislative statement of purpose provides statutory meaning independent of the operative statutory text.

2489 (2015) ("[O]ftentimes the 'meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 438, 450 (2002))). The FSIA starts with a baseline rule of execution immunity; the exceptions are few and "narrowly drawn." *Autotech*, 499 F.3d at 749.

Given the broad protective stance of the statutory scheme in general, we cannot say with confidence that § 1610(a) *unambiguously* abrogates a foreign sovereign's execution immunity when a third party uses its property for a commercial activity. Rather, the statutory declaration of purpose suggests that a narrower interpretation is correct: A foreign state may lose its execution immunity only by *its own* commercial use of its property in the United States.

Trying another tack, the plaintiffs direct our attention to the language of § 1605(a), the commercial-activity exception to jurisdictional immunity, which specifically states that the commercial activity must be "carried on in the United States *by the foreign state*" before immunity is lost. (Emphasis added.) The absence of similar language in § 1610(a), they argue, means that the commercial-activity exception to execution immunity is broader than its parallel in § 1605(a) and applies whenever a third party uses a foreign state's property for a commercial activity.

This argument contradicts the settled principle that the exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. *NML Capital*, 134 S. Ct. at 2256; *Rubin*, 637 F.3d at 796; *DeLetelier v. Republic of Chile*, 748 F.3d 790, 798-99 (2d Cir. 1984). This principle is both well established and based on a critical diplomatic reality: Seizing a foreign state's property is a serious affront to its sovereignty – much more so than taking jurisdiction in a lawsuit. Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.

The plaintiffs' interpretation of § 1610(a) turns this important principle on its head. A third party's commercial use of a foreign state's property, which cannot establish jurisdiction over the foreign state, would suffice to strip the foreign state's property of its execution immunity. That cannot be right.

Accordingly, we join the emerging consensus of our sister circuits and hold that a third party's commercial use of a foreign state's property does not trigger the § 1610(a) exception to execution immunity. Rather, § 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States; the actions of third parties are irrelevant.

Nothing in the record suggests that Iran itself used the Persepolis Collection for a commercial activity in the United States. Indeed, the plaintiffs do not

argue otherwise. The district court reached the correct conclusion: Section 1610(a) does not apply.[4]

D. 28 U.S.C. § 1610(g)

Alternatively, the plaintiffs argue that § 1610(g) provides an independent basis to execute on the artifacts. A bit of background is necessary before we take up this argument.

Congress enacted § 1610(g) as part of the National Defense Authorization Act of 2008, which ushered in several changes to the FSIA as applied in cases of state-sponsored terrorism. We've already mentioned one: Section 1605A replaced § 1605(a)(7), the previous terrorism exception to jurisdictional immunity. Section 1605A includes an identical exception to jurisdictional immunity but "is more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under" the previous law. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 58 (D.D.C. 2009).

The other major change was the creation of § 1610(g), which applies to execution proceedings to enforce judgments obtained under § 1605A and eases the collection process for victims of state-sponsored terrorism by eliminating the *Bancec* rule that foreign

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[4] Our holding makes it unnecessary to decide whether the University's academic study of the Persepolis Collection is a commercial use.

sovereigns and their instrumentalities are treated separately for execution purposes. The 2008 legislation also provided that certain judgments obtained under the old § 1605(a)(7) could be converted to judgments under § 1605A so that judgment creditors could access the benefits of § 1610(g). The plaintiffs successfully converted their judgment, and they now contend that § 1610(g) makes *all* Iranian assets available for execution without proof of a nexus to commercial activity – that is, without having to satisfy § 1610(a). They argue, in other words, that subsection (g) is a freestanding exception to execution immunity for terrorism-related judgments.

Iran and the University dispute that interpretation. They agree that subsection (g) was intended to – and does – make it easier for terrorism victims to enforce their judgments. But they maintain that it does so *only* by abrogating the *Bancec* doctrine for § 1605A judgments; subsection (g) is not itself an exception to execution immunity. The United States supports this interpretation and joins Iran and the University in urging us to adopt it.

We begin with the *Bancec* doctrine, which derives from the Supreme Court's 1983 decision known by that name. *Bancec* established a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality. 462 U.S. at 626-27 ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . .

that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.") (citation omitted). That's the general rule in the law of private corporations, and the Court applied it to the juridically separate instrumentalities of foreign governments. *Id.* The Court recognized two exceptions: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work a fraud or injustice. *Id.* at 628-33.

The Court expressly declined to elaborate on these exceptions, however. *Id.* at 633 ("Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."). So the lower courts had to fill the gap. Soon after *Bancec* was decided, the federal courts began to coalesce around a set of five factors for determining when the exceptions applied. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380-82, 1380-81 n.7 (5th Cir. 1992). The following formula from the Fifth Circuit is typical; courts should consider:

> (1) The level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

> (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Walter Fuller Aircraft, 965 F.2d at 1380 n.7.

Fast forward to 2008 and the enactment of the National Defense Authorization Act, which created § 1605A and § 1610(g). In relevant part, § 1610(g) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, . . . is subject to attachment . . . and execution . . . *as provided in this section*, regardless of –
>
> **(A)** the level of economic control over the property by the government of the foreign state;
>
> **(B)** whether the profits of the property go to that government;
>
> **(C)** the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> **(D)** whether that government is the sole beneficiary in interest of the property; or
>
> **(E)** whether establishing the property as a separate entity would entitle the

> foreign state to benefits in United States courts while avoiding its obligations.

(Emphases added.)

Put more succinctly, subsection (g) permits a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state *and* the property of its agency or instrumentality "*as provided in this section*" but "*regardless of*" the five factors listed in subsections (A) – (E).

As the careful reader no doubt has grasped, the five factors made irrelevant by subsection (g) mirror almost exactly the factors developed by the lower courts under the *Bancec* doctrine. For ease of comparison, we've prepared this chart:

***Bancec* Doctrine Factors**	**Factors Made Irrelevant by Subsection (g)**
(1) the level of economic control by the government;	(A) the level of economic control over the property by the government of the foreign state;
(2) whether the entity's profits go to the government;	(B) whether the profits of the property go to that government;
(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;	(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and	(D) whether that government is the sole beneficiary in interest of the property; or
(5) whether adherence to separate identities would entitle the foreign state to benefits in Unite States courts while avoiding its obligations.	(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The nearly identical language is either a stunning coincidence or Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments. It's impossible to ignore the clear textual parallels between subsection (g), the *Bancec* rule, and the preexisting caselaw. Indeed, we've already noted that subsection (g) overrides the *Bancec* doctrine for terrorism-related judgments. *See Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014).

The key question here – a question not expressly decided in *Gates* – is whether, as the plaintiffs contend, subsection (g) goes further and establishes a freestanding "terrorism" exception to execution immunity.

Iran and the University – with support from the United States – caution against reading a corrective measure so plainly aimed at eliminating the *Bancec* barrier as creating a new and independent exception to execution immunity for all terrorism-related judgments. They direct our attention to language in

subsection (g) specifically limiting its scope: The text says that for § 1605A judgments, the property of a foreign state and the property of its agency or instrumentality are "subject to attachment . . . and execution . . . *as provided in this section*." The highlighted phrase makes very little sense – indeed, is entirely superfluous – if subsection (g) is itself a freestanding exception to execution immunity. The plaintiffs' reading of subsection (g) thus violates the "cardinal principle" that a statute should be interpreted to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The plaintiffs suggest that the phrase "as provided in this section" refers to only the "non-substantive rules" set forth in § 1610. But they offer no basis for limiting the phrase in that manner, nor have they identified which non-substantive rules they think Congress meant to include in subsection (g). Moreover, it would be very odd to read "as provided in this *section*" as referring only to certain unidentified subsections of § 1610. The word "section" must mean what it says: Subsection (g) modifies *all* of § 1610.

Treating § 1610(g) as an independent basis for execution also creates superfluities in other parts of the statute. For example, subsections (a)(7) and (b)(3) of § 1610 relate specifically to judgments obtained under § 1605A, the current terrorism exception to jurisdictional immunity, and its predecessor, § 1605(a)(7). If subsection (g) paves a dedicated lane for all execution

actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all.[5]

In their reply brief, the plaintiffs seek refuge in our decision in *Gates*, which they say has already resolved this interpretive question in their favor. We disagree, though we can see how *Gates* might be read in that way. *Gates* involved a lien-priority contest between two sets of terrorism victims holding § 1605A judgments against Syria. 755 F.3d at 572-73. Both sets of victims – the "Gates plaintiffs" and the "Baker plaintiffs" – sought to execute on the same assets owned by Syrian instrumentalities but held by an American bank and a telecommunications company and located within the territorial jurisdiction of the Northern District of Illinois. *Id.* at 573-74. The dispute concerned compliance with the procedural requirements of § 1610(c). That subsection provides that

> [n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and

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[5] Moreover, as we've noted, subsection (g) was enacted at the same time as § 1605A. In the same 2008 legislation, subsections (a)(7) and (b)(3) of § 1610 were amended to make the commercial-activity exceptions applicable to judgments obtained under § 1605A, the new exception to jurisdictional immunity for terrorism-related cases. If, as the plaintiffs claim, subsection (g) were a free-standing exception to execution immunity for § 1605A judgments, then these amendments – enacted at the same time – were completely unnecessary.

> the giving of any notice required under section 1608(e) of this chapter.

§ 1610(c). The cross-referenced provision establishes rules for obtaining a default judgment against a foreign state or its agency or instrumentality. 28 U.S.C. § 1608(e).

The Gates plaintiffs obtained a § 1610(c) order from the district court in the District of Columbia, where their judgment was entered, then registered the judgment in the Northern District of Illinois, where the assets of the Syrian instrumentality were located. A few days later, the Baker plaintiffs also registered their judgment in the Northern District of Illinois, but "[u]nlike the Gates plaintiffs, . . . [they] sought and obtained a new § 1610(c) order from the Northern District of Illinois." *Gates*, 755 F.3d at 574. The Baker plaintiffs then argued that their lien had priority because the Gates plaintiffs hadn't obtained a new § 1610(c) order in the Northern District of Illinois. The Gates plaintiffs responded with two arguments: First, "§ 1610(c) does not apply at all," and second, "even if it does, one order per judgment suffices for attachment and execution anywhere in the United States." *Id.* at 575.

The panel sided with the Gates plaintiffs, ruling in their favor on both grounds, either of which was independently sufficient to support the judgment. *Id.* at 578 ("For two independent reasons, then, § 1610(c) does not bar the priority of the Gates plaintiffs' liens. . . ."). Addressing the first argument, the panel

noted that the Gates plaintiffs "are not seeking attachment under § 1610(a) or (b). They seek attachment under § 1610(g), which authorizes attachment of property of foreign state sponsors of terrorism and their agencies or instrumentalities to execute judgments under § 1605A for state-sponsored terrorism." *Id.* at 575. The panel continued: "Section 1610(g) is not mentioned in § 1610(c). By its terms, then, § 1610(c) simply does not apply to execution or attachment under § 1610(g)." *Id.*

Alternatively, the panel held that "[e]ven if § 1610(c) applie[s] to attachment efforts under § 1610(g)," one order "suffices for attachment efforts throughout the United States." *Id.* at 577. The § 1610(c) order issued by the D.C. district court was thus sufficient; the Gates plaintiffs "were not required to seek a duplicative determination of the same question by the Northern District of Illinois before attaching the Syrian assets." *Id.* at 578.

Notably, *Gates* assumes rather than decides the crucial antecedent question – that is, whether § 1610(g) is itself a freestanding exception to execution immunity. Instead, it simply describes subsection (g) in a way that implies an affirmative answer. Perhaps that's not surprising; the issue was not developed by the parties. To be sure, the *Gates* opinion touches on the *Bancec* doctrine, observing that § 1610(g) "was intended to avoid limits the Supreme Court had imposed on the ability of litigants to attach the assets of foreign state agencies and instrumentalities." *Id.* at 576. And there's no doubt that the opinion *treats* § 1610(g) as if

it *were* an independent exception to execution immunity, albeit without actually deciding the question. Indeed, that's the premise of the panel's holding that § 1610(c) does not apply.

But nowhere does the *Gates* opinion grapple with the fundamental interpretive question presented here. Instead, the parties and the court appear to have assumed without further inquiry that subsection (g) is an independent basis for attachment and execution for all terrorism-related judgments. Tellingly, there's no mention in *Gates* of the limiting phrase in subsection (g) "as provided in this section," nor any reference to the statutory superfluities created by the broader interpretation advanced by the Rubin plaintiffs here.

A second appeal from the same attachment proceeding – this time involving a dispute between the Gates plaintiffs and the "Wyatt plaintiffs" – again found for the Gates plaintiffs but likewise neither raised nor decided the antecedent interpretive question. *See Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342-43 (7th Cir. 2015). The Wyatt plaintiffs mounted a collateral challenge to the § 1610(c) order that the Gates plaintiffs had obtained from the D.C. district court. *Id.* at 334-35, 342. The panel did not directly address this argument, relying instead on the holding of *Gates* that "'§ 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.'" *Id.* at 343 (quoting *Gates*, 755 F.3d at 575). As in *Gates*, the opinion in *Wyatt* does not mention the fundamental interpretive question about the scope of § 1610(g). *Wyatt*

thus left the unexamined premise of *Gates* unexamined.

In the meantime, the Ninth Circuit has been wrestling with the precise question presented here in a case involving assets of Bank Melli, an instrumentality of Iran. A panel of that court initially adopted the interpretation urged by the Rubin plaintiffs here – that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1287 (9th Cir. 2015). Bank Melli petitioned for rehearing, and three weeks later the panel invited the views of the United States on the proper interpretation of § 1610(g). The United States responded, taking the same position it advances in this case. On February 22, 2016, the panel withdrew its earlier opinion and issued an amended one again holding that subsection (g) contains a freestanding exception to execution immunity. *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016). Judge Benson disagreed with the majority's interpretation of subsection (g) and filed a partial dissent on that issue. *Id.* at 1149-51. The panel expressly invited Bank Melli to file another petition for panel and en banc rehearing. *Id.* at 1136.

Bank Melli did so, and on June 14, 2016, the panel issued a second amended opinion. *See Bennett v. Islamic Republic of Iran*, Nos. 13-15442 & 13-16100, 2016 WL 3257780 (9th Cir., June 14, 2016). The majority reaffirmed its earlier conclusion that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies

or instrumentalities." *Id.* at *6. Judge Benson again dissented. *Id.* at *11-14. With this latest decision, the Ninth Circuit appears to be done with the case; the panel's order indicates that no judge requested a vote on Bank Melli's petition for en banc rehearing. *Id.* at *2.

The *Bennett* majority purported to explain away the "as provided in this section" language in subsection (g) by interpreting it to apply only to § 1610(f). *Id.* at *6 ("When subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)."). That strikes us as a highly strained interpretation. First, as we've already noted, it implausibly reads the word "section" as "*sub*section," so the phrase "as provided in this section" actually means "as provided in *sub*section (f)."

Second, and importantly, § 1610(f) *never became operative.* It was adopted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998), and pertains to execution on property associated with certain regulated and prohibited financial transactions. Congress originally authorized the President to waive subsection (f)'s provisions "in the interest of national security." *Id.* § 117(d), 112 Stat. at 2681-492. President Clinton immediately issued a blanket waiver. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Congress briefly repealed the President's waiver authority in the Victims of Trafficking and Violence Protection Act of

2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1541, 1543, but quickly restored it, *id.* § 2002(f)(1)(B), 114 Stat. at 1543, codifying the Executive's waiver authority in 28 U.S.C. § 1610(f)(3): "The President may waive any provision of paragraph (1) in the interest of national security." President Clinton issued another blanket waiver that same day. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

So subsection (f), being inoperative from the start, does not allow *any* form of execution. Congress enacted subsection (g) just eight years later. If the Ninth Circuit's reasoning is correct, subsection (g) was effectively a nullity upon passage. That cannot be the correct interpretation. *See Voisine v. United States*, No. 14-10154, 2016 WL 3461559, at *6 (U.S., June 27, 2016) (explaining that Congress is presumed to legislate against the backdrop of the "known state of the laws" (quoting *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835))). It therefore makes no sense to say, as the *Bennett* majority does, that the phrase "as provided in this section" in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution "as provided in this section" would mean no execution at all.

For these reasons, we disagree with the Ninth Circuit's interpretation of subsection (g). We note that the *Bennett* majority drew support for its conclusion from our decisions in *Gates* and *Wyatt*, apparently reading them as the plaintiffs do here. *See Bennett*, 2016 WL 3257780, at *7. That's understandable for the reasons we've already explained. To the extent that *Gates* and

Wyatt can be read as holding that § 1610(g) is a free-standing exception to execution immunity for terrorism-related judgments, they are overruled.[6]

To summarize: Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the *Bancec* rule for terrorism-related judgments. Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state's property *and* the property of its agency or instrumentality – without regard to the *Bancec* presumption of separateness – but they must do so "as provided in this section." § 1610(g). That is, they must satisfy an exception to execution immunity found elsewhere in § 1610 – namely, subsections (a) or (b).

E. The Terrorism Risk Insurance Act

Finally, the plaintiffs argue that the Persepolis Collection is subject to attachment and execution under section 201(a) of TRIA, which permits a person who holds a judgment against a state sponsor of terrorism to execute on the foreign state's assets (and those of certain agencies and instrumentalities) if the assets

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[6] Because this opinion overrules circuit precedent and creates a conflict with the Ninth Circuit, it has been circulated to all judges in active service in accordance with Circuit Rule 40(e). Chief Judge Wood and Circuit Judges Posner, Flaum, Easterbrook, and Rovner did not participate, so a majority did not vote to rehear this case en banc. Circuit Judge Hamilton has filed a dissent from the denial of en banc review, which is attached to this opinion.

have been blocked by executive order under certain international sanctions provisions. Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002). An asset is deemed to be blocked when it has been "seized or frozen" by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 or 203 of the International Emergency Economic Powers Act. *Id.* § 201(d)(2)(A), 116 Stat. at 2339.

In response to the 1979 Iran hostage crisis, President Carter invoked his authority under the International Emergency Economic Powers Act and issued Executive Order 12170, which froze all Iranian assets in the United States. Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). The hostage crisis was resolved in 1981 with the Algiers Accords, and in accordance with commitments made in that agreement, President Carter issued Executive Order 12281, which unblocked all uncontested property interests of the Iranian government. Exec. Order No. 12281, 46 Fed. Reg. 7923 (Jan. 19, 1981). The order gave implementing authority to the Treasury Department. *Id.* at 7924. The Treasury Department's Office of Foreign Assets Control issued regulations broadly defining unblocked property as "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). A property interest is considered "contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset," and a belief is considered reasonable "only if it is based on a bona fide opinion, in

writing, of an attorney licensed to practice within the United States stating that Iran does not have title or has only partial title to the asset." *Id.* § 535.333(c).

There's no evidence that the University contests Iran's title to the Persepolis Collection. To the contrary, the University has reaffirmed the terms of the long-term academic loan, which unambiguously requires it to return the artifacts to Iran when study is complete. Nor has the University sought or obtained an attorney's opinion that Iran lacks title or has only partial title to the artifacts.

The plaintiffs argue that the Persepolis Collection remains a blocked asset subject to execution because the University asserted in a June 2004 district-court filing that it maintained a "superseding possessory right." But no one disputes that the University has a present *possessory interest* in the Persepolis Collection. Iran nonetheless retains full *ownership*. The plaintiffs place great emphasis on the fact that Iran has periodically inquired about the progress of the study and has occasionally requested the return of the artifacts. That simply reinforces the University's present possessory interest; it's not evidence of contested title.

Alternatively, the plaintiffs claim that the artifacts have been "reblocked" by President Obama's Executive Order 13599. 77 Fed. Reg. 6659, 6659 (Feb. 8, 2012). But section 4(b) of this order expressly exempts all "property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter

made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981." *Id.* at 6660.

The plaintiffs argue that "transfer directives" means a directive from Iran, and because Iran has never directed that these particular artifacts be transferred to it, the exception in section 4(b) doesn't apply to the Persepolis Collection. This argument misreads the 2012 order, which refers to "transfer directives set forth in" President Carter's 1981 Executive Order that all property meeting certain specified criteria be returned to Iran. That is, the directive is categorical rather than contingent on a particularized demand by Iran.

Accordingly, the district judge was right to conclude that attachment and execution under section 201 of TRIA is unavailable.

AFFIRMED.

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Teste:

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Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

HAMILTON, *Circuit Judge*, dissenting from denial of en banc review. The panel opinion in *Rubin v. Islamic Republic of Iran*, No. 14-1935, both creates a circuit split and overrules, in part, two recent decisions of this court. Either step by itself would ordinarily trigger our Circuit Rule 40(e), which requires circulation within the court before publication to see if a majority of active judges wish to rehear the case en banc.

In this case, a majority of active judges do not even have the opportunity to vote. A majority are disqualified, so it is impossible to hear this case en banc. In this rare situation, the panel apparently has the *power* to overrule circuit precedent and to create a circuit split without meaningful Rule 40(e) review. Yet that step is a mistake that should not go without comment. Also, most Rule 40(e) decisions settle the legal issue in the circuit. In this rare situation, one panel's decision to overrule another's decisions should not be treated as settling the legal issue in this circuit. I respectfully dissent.

The issue is whether a provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1610(g), offers a freestanding basis for executing judgments against state sponsors of terrorism, independent of § 1610(a) and (b). As dry and technical as that sounds, the issue has important practical consequences for victims of state-sponsored terrorism. Most important, the *Rubin* panel's view restricts execution to foreign sovereign assets that are used: (a) by the foreign sovereign itself, (b) for a commercial activity, and (c) in the United States. That reading shelters from execution a

wide range of assets of state sponsors of terrorism, such as the museum collection here.

If, on the other hand, § 1610(g) offers a freestanding basis for execution, then victims are not limited to property the sovereign uses commercially in the United States. Victims of state-sponsored terrorism may execute judgments against a broader range of foreign sovereign assets. That's the view of the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, ___ F.3d ___, ___ & nn. 4-7, 2016 WL 3257780, at *6-7 & nn. 4-7 (9th Cir. 2016), which held that § 1610(g) provides a freestanding basis for executing judgments for state-sponsored terrorism. That reading should enable the plaintiffs in *Bennett* to execute on assets that were not used commercially in the United States. See *id.* at *4 (cash in United States that was owed to Iranian state bank for use of credit cards in Iran). That same reasoning would extend to the museum collection at issue here.

Whether § 1610(g) provides a freestanding basis also affects the procedures that victims of state-sponsored terrorism must follow to execute their judgments. We dealt with procedural issues in both *Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342-43 (7th Cir. 2015), and *Gates v. Syrian Arab Republic*, 755 F.3d 568, 575-77 (7th Cir. 2014) (alternative holding). In both cases, we adopted the view that § 1610(g) is freestanding, which broadens the rights of victims v. state sponsors of terrorism, while still assuring due process of law.

The details of the textual arguments are laid out well in *Bennett* and *Rubin*, and I will not repeat them. Both readings of the text, I believe, are reasonable, meaning that the text is ambiguous. The courts must choose between two statutory readings: one that favors state sponsors of terrorism, and another that favors the victims of that terrorism.

The FSIA contains detailed protections for foreign governments in most civil litigation. But over the years, Congress has added special provisions for cases of state-sponsored terrorism, including the addition of § 1610(g) as part of § 1083 of Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008. Those special provisions, including § 1610(g), work together to make it easier for victims of state-sponsored terrorism to pursue foreign sovereign assets in the United States. In 2008, Congress even took the unusual step of applying the new provisions to pending cases. P.L. 110-181, § 1083(c). See also *Bennett*, 2016 WL 3257780, at *8 (legislative history of 2008 amendments shows broad intent to facilitate execution of judgments against *any* property owned by state sponsors of terrorism).

I recognize that "no legislation pursues its purposes at all costs," and that it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). But in interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history. We must choose one

side or the other. The balance here should weigh in favor of the reading that favors the victims. We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel.

We should continue to follow *Gates* and *Wyatt*, and we should avoid creating a conflict with *Bennett*, especially in a case where the en banc court cannot act. We should allow the *Rubin* plaintiffs to pursue broader categories of Iranian property, including the Persepolis Collection at the University of Chicago.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART E. HERSCH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, TZVI ROSENMAN, Plaintiffs, v. THE ISLAMIC REPUBLIC OF IRAN, THE IRANIAN MINISTRY OF INFORMATION AND SECURITY, AYATOLLAH ALI HOSEINI KHAMENEI, ALI AKBAR HASHEMI-RAFSANJANI, ALI FALLAHIAN-KHUZESTANI Defendants. THE UNIVERSITY OF CHICAGO, THE FIELD MUSEUM OF NATURAL HISTORY, Citation Respondents.	No. 03 C 9370 Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

In this action, plaintiffs seek to attach and execute on numerous ancient Persian artifacts in the possession of the University of Chicago and the Field Museum of Natural History ("the Museums") to satisfy a default judgment entered against the Islamic Republic of Iran ("Iran").[1] Both the Museums and Iran (collectively, "defendants") have moved for summary judgment, asserting that the artifacts are not subject to attachment under any of the statutes cited by plaintiffs. For the reasons described below, the defendants' motions for summary judgment are granted.

BACKGROUND[2]

The facts of this case have been described in previous district court and appellate opinions, *see Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 786 (7th Cir. 2011),[3] and the court will not rehash those facts in detail here. In short, on September 4, 1997, Hamas carried out a horrific triple suicide bombing in Jerusalem

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[1] Jurisdiction for the underlying action was predicated on the exceptions to sovereign immunity detailed in 28 U.S.C. § 1605(a)(7).

[2] The following facts are, unless otherwise specified, undisputed and come from the parties' L.R. 56.1 statements.

[3] In 2011, the Museums appealed two orders by the district judge previously assigned to this case regarding discovery issues and the propriety of the assertion of an affirmative defense. *See Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011). That opinion dealt with these preliminary issues and remanded the case to the district court. The details of the opinion are discussed below.

that killed five individuals and wounded 200. Plaintiffs are American citizens who were either wounded or suffered severe emotional and loss-of-companionship injuries as a result of the attack. Plaintiffs sued Iran in the federal district court in Washington, D.C., alleging that Iran was responsible for the bombings as a result of the training and support it had provided to Hamas, and obtained a $71.5 million default judgment. Plaintiffs now seek to collect on that judgment by attaching alleged assets of Iran located within the United States. The assets relevant to this case are a number of collections of artifacts[4] currently in the possession of the Museums.

The Persepolis and Chogha Mish Collections are in the possession of the University of Chicago. Both belong to the National Museum of Iran and are on long-term loan to the University of Chicago's Oriental Institute ("the Institute") for scholarly study.

The Chogha Mish Collection consists of a small number of clay seal impressions recovered from excavations in Iran in the 1960s. Iran loaned the Chogha Mish Collection to the Institute for the purpose of academic study in the 1960s, and most of the collection was returned in 1970. In 1982, Iran informed the Institute that some items in the collection were missing. The Institute agreed to search for and return any inadvertently retained artifacts. In 1983, Iran filed a

[4] The court uses the terms "artifacts" and "collections" to describe all of the assets collectively. When an argument applies to a subset of those collections, the court will name the collection individually.

claim in the Iran-U.S. Claims Tribunal ("the Tribunal") seeking the return of the missing objects. Since the claim was filed, the Institute has located some of the missing objects, but has not returned those objects due to the citation entered in this case on May 20, 2004.[5]

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments in the possession of the Institute. In 1937, Iran agreed to loan the Persepolis Collection to the Institute to be read and translated. The terms of the agreement allowed the Institute to retain 500 bricks upon completion of the deciphering operation, with the remaining 29,500 bricks to be returned to Iran. Over the years, Iran has made numerous inquiries into the timeline for the return of the bricks. Most recently, in 2004, the Institute entered into an agreement with Iran to return 300 tablets and to deliver the remainder to Iran "gradually and soon."

The Museums allege that the remaining artifacts of Iranian origin are the property of the Museums, while plaintiffs argue that they are the property of Iran. The Herzfeld Collection is a collection of roughly 1,200 prehistoric Persian artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archeologist who worked in Persia from 1905 to 1936. The Field Museum purchased the collection in April 1945 for $7,300. The Field Museum subsequently sold part of the collection to the Institute in 1945, but

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[5] On May 20, 2004, plaintiffs issued a Citation to Discover Assets to the Museums. Because those artifacts are the subject of pending litigation, the Institute has not turned them over to Iran.

took back six pieces in December 1946. Plaintiffs allege that Herzfeld is widely believed to have removed antiquities from Iran without the permission of Persian officials, and that he failed to provide evidence of his right to own and possess the items. Because of the lack of provenance of the items, plaintiffs argue that the Herzfeld Collection remains the property of Iran.

The remaining artifacts are small collections that the Museum defendants refer to collectively as "the OI collection."[6] The Institute states these items were acquired through a division of joint excavation finds with

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[6] Plaintiffs separately identify each of the small collections that make up the OI collection, including: the Gremliza Collection, the Adams Collection, the Cooper Collection, "Bronze Bands with Striding Griffins," the Alizadeh Collection, and Accession 3699. The Gremliza Collection came into the possession of the Institute in 1988 from a traveling medical doctor, Dr. Gremliza, who visited Iranian villages in the mid-1960s. Plaintiffs allege that Dr. Gremliza did not lawfully possess or own the items, and that he did not have permission to export them. The "Bronze Bands with Striding Griffins" are four sections of a bronze band that are part of the residual OI collection, and plaintiffs note that there are no records of how the items came into the possession of the Institute. The Adams Collection was acquired through Robert Adams, but plaintiffs assert that Adams did not own the items and that the Institute's evidence as to provenance is insufficient. The Cooper Collection was donated by Dr. Cooper, who found the items while stationed near Persepolis during World War II. Plaintiffs allege that Cooper's ownership of the collection is questionable. The Alizadeh Collection was given to the Institute in 1995 by a staffer, Abbas Alizadeh, who stated that he found them in a former staffer's home. Plaintiffs argue that the Institute has no records as to the ownership or authorizations by the staffer. Accession 3699 is a Persian tile "probably" given to the Institute by Otis Ellery Taylor. Plaintiffs argue that its chain of ownership is unknown.

Iran or as gifts from third parties, and claims that the Institute owns the items. Plaintiffs claim that the items were improperly removed from Iran and remain Iranian property.

Defendants have each moved for summary judgment, arguing that no legal mechanism exists that would permit the attachment of these antiquities. Iran seeks summary judgment with regard to the Persepolis Collection and the Chogha Mish Collection. The Museums seek summary judgment with respect to the Herzfeld Collection and the OI Collection. Specifically, defendants argue that there is no basis for plaintiffs to attach the artifacts under the exceptions to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, or the Terrorism Risk Prevention Act, 28 U.S.C. § 1610 note.

DISCUSSION

I. Standard

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unterreiner v. Volkswagen of Am., Inc.*, 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Becker*

v. Tenenbaum-Hill Assocs., Inc., 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *See Green v. Carlson*, 826 F.2d 647, 650 (7th Cir. 1987) ("[W]hen considering the qualified immunity issue on a motion for summary judgment, a district court should consider all of the undisputed evidence in the record, read in the light most favorable to the non-movant."); *Fisher v. Transco Services-Milwaukee Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Stewart v. McGinnis*, 5 F.3d 1031, 1033 (7th Cir. 1993). The nonmoving party must, however, do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson*, 477 U.S. at 252.

II. Foreign Sovereign Immunities Act

Both Iran and the Museums have moved for summary judgment on the ground that plaintiffs may not attach the artifacts under the FSIA. Under the FSIA, all "property in the United States of a foreign state

shall be immune from attachment" unless exempted by an enumerated exception. 28 U.S.C. § 1609. All defendants argue that no exception to the FSIA applies to the collections, and thus no mechanism exists under the FSIA to attach the artifacts.[7] Plaintiffs bear the burden of demonstrating that the property is not immune from attachment. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011); *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005).

A. Commercial Activity Exception

Plaintiffs argue that one of the enumerated exceptions to the FSIA detailed in Section 1610, the commercial activity exception, allows the attachment of the Persepolis Collection. Section 1610 provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment. . . ." 28 U.S.C. § 1610(a). Commercial activity is defined in Section 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by

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[7] The Museums argue that the Herzfeld and OI Collections are not the property of a foreign state, and that the FSIA therefore cannot serve as the basis for attachment. Because the question of commercial activity, discussed below, resolves the FSIA question for all the collections, the court need not reach the question of whether the items in the Herzfeld and OI Collections are the property of Iran.

reference to its purpose." Plaintiffs do not argue that Iran used any of the artifacts in a commercial manner to satisfy this exception; rather, plaintiffs contend that the Institute acts as Iran's agent, and therefore any commercial activity on the part of the Institute may properly be attributed to Iran. The parties dispute whether: (1) the commercial use must be conducted solely by the sovereign to subject the artifacts to attachment; (2) whether the Institute may be characterized as Iran's agent and their actions therefore attributed to Iran; and (3) whether the acts performed by the Institute in the course of studying and displaying the artifacts constitute "commercial activity."

Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign. For this reason, plaintiffs argue that the exemption should not be construed as limited to Iran's activities and may cover actions by the Museums. Plaintiffs note that Section 1605 of the FSIA, which discusses the exceptions to jurisdictional immunity, contains a discussion of how a sovereign's commercial activities may subject it to the jurisdiction of U.S. courts. Subsection (a)(2) of Section 1605 provides that a foreign state will not be immune from jurisdiction in a case "in which the action is based upon a commercial activity carried on in the United States by the foreign state[.]" Because that subsection explicitly provides that the commercial activity must be carried on by the foreign state, plaintiffs argue that the drafters of the FSIA could have included that same explicit language in Section 1610, but chose not to do so.

Therefore, as a matter of statutory construction, plaintiffs argue that the drafters must have intended not to restrict Section 1610 to activities carried on solely by the foreign state.

The court disagrees with plaintiffs' interpretation of the statute. First, Section 1603 defines a number of terms used throughout the FSIA. In Section 1603, a "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." The defined term, therefore, does not simply refer to actions conducted only by the foreign nation, but contains the additional clause requiring that activity to have substantial contacts with the United States. The defined term does not require that the commercial activity actually take place within the borders of the United States, but rather that the activity have substantial contacts with the United States. In contrast, the language of Section 1610 provides that the property must be "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). An equally reasonable explanation for Congress' decision not to use the defined phrase in Section 1610 is to avoid expanding that Section to property used for a commercial activity having substantial contact with the United States. The drafters' exclusion of the phrase "carried on in the United States by a foreign state" is therefore not dispositive of an intention to broaden the scope of Section 1610 to actions conducted by other entities.

Further, Section 1602 of the FSIA articulates Congress' declaration of purpose in passing the Act. It states that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. A plain reading of that subsection demonstrates that it is the sovereign's commercial activities that subject the property to attachment.

Various courts have also examined the legislative history of the FSIA and determined that Congress intended Section 1610 to be limited to acts of the sovereign. *See Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D.Mass. 2006) (holding that the plain language, legislative history, and prevailing principles of international law compel the conclusion that the exception in Section 1610 should be interpreted to apply only where the sovereign itself conducts the activity); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251-60 (5th Cir. 2002) (applying the principles of international law to the FSIA); *DeLetelier v. Republic of Chile*, 748 F.2d 790, 795-98 (2d Cir. 1984) (holding that FSIA's exceptions for executional immunity are narrower than its exceptions for jurisdictional immunity); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 21-24 (D.D.C. 1999) (holding that the Supreme Court's analysis of the FSIA in *Republic of Argentina v. Weltover*, 504 U.S. 607, 611-14 (1992), compels the conclusion that Congress intended

Section 1610 to apply to the actions of the sovereign). This court agrees with the district courts that have interpreted Section 1610 to require action on the part of the sovereign for the commercial use exception to apply.

Plaintiffs further argue that a foreign state cannot conduct commercial activities on its own and must act through agents. With respect to the Persepolis Collection,[8] plaintiffs argue that the Institute is Iran's agent because the Institute has a fiduciary relationship with Iran and serves as bailee of Iran's property. As evidence of this alleged agency relationship, plaintiffs point to Iran's "working relationship" with the Institute, and equates that relationship to a fiduciary relationship. Plaintiffs also reference filings in this case where Iran has admitted to a bailor-bailee relationship with the Institute, and equate that relationship with an agency relationship. Plaintiffs argue that an agency relationship exists because the Institute must account to Iran for its activities, and that Iran has the right to exercise control over the Institute with regard to the artifacts.

Under Illinois law, a "principal-agent relationship is a legal concept founded upon a consensual and fiduciary relationship between two parties." *Knapp v. Hill*, 276 Ill. App. 3d 376, 380, 657 N.E.2d 1068, 1071 (1st

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[8] Plaintiffs have abandoned their FSIA argument regarding the Chogha Mish Collection and do not argue that the commercial activity exception applies to the Museum Collections; therefore, the court will discuss only the Persepolis Collection.

Dist. 1995). The central question is "whether the principal had the right to control the activities of the agent." *Id.* Agents also owe duties of good faith, fidelity, and loyalty to the principal. *ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill. App. 3d 671, 20 Ill. Dec. 160, 379 N.E.2d 1228 (1st Dist. 1978).

Although the Institute and Iran have a "working relationship," the record does not demonstrate that the relationship is an agency relationship such that Iran controls the Institute. The relationship between the parties regarding the Persepolis Collection is set forth in a loan agreement between Iran and the Institute, and the terms of the relationship are governed by that agreement. Under the agreement, the Institute has possession of the Collection for the purposes of study and translation, and is obligated to return the Collection once it completes its studies. This relationship is not the equivalent of an agency relationship because Iran (the alleged principal) cannot control the activities of the Institute (the alleged agent) other than to obtain possession of the Collection when the Institute, in its judgment, is finished with its studies. The relationship is therefore more a bailment than an agency.

"Under Illinois law, bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled the goods shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them." *In re Mississippi Valley Livestock, Inc.*, ___ F.3d ___, 2014 WL 949969 (7th Cir. Mar. 12, 2014) (internal quotations and citations omitted). But

a bailment is not equivalent to an agency relationship. Plaintiffs cite *In Re Couthamel Potato Chip Co.*, 6 B.R. 501, 507 (Bkr. E.D.Pa. 1980), wherein the bankruptcy court stated that bailment is a "true agency relationship." However, in the very next paragraph of that opinion, the court goes on to discuss the distinct definitions of a bailment and an agency, noting that they are not one and the same, but similar. *Id.* Indeed, although a bailee may be an agent of a bailor in certain circumstances, not every bailee is an agent. *See Lionberger v. United States*, 371 F.2d 831, 840 (Ct. Cl. 1967). Because a bailment relationship by itself does not give the bailor control of the bailee, the concepts and relationship are different than an agency. *Id.* (Noting that "[w]here the one who acts in another's behalf is not at the same time also subject to his control, then the relationship, though otherwise a bailment, is not also an agency."). The record does not demonstrate that the Institute had any duties above and beyond the responsibilities articulated in the agreement with Iran, or that Iran directed the activities of the Institute such that the bailee relationship was elevated to an agency relationship.

It should also be noted that the Institute is conducting this academic study for its own research purposes, and not for Iran's benefit. Under the agreement, the Institute consented to provide to Iran "two copies of each of the works, review articles, collections of photographs or drawings it publishes based on the facts made known or the objects found during the work" at the Persepolis excavation, but the letter memorializing

the agreement does not place further burdens or substantial conditions on the Institute.[9] There is no indication in the record that the Institute ever claimed more than a present possessory interest in the collection, or manifested anything other than an intention to work in its own interest. Plaintiffs' claim that the Institute is controlled by Iran are therefore unconvincing.

Because Section 1610 requires the commercial activity to be conducted by the sovereign, and there is no evidence that the Institute may properly be considered an agent of Iran, the court finds that the assets are not subject to attachment under Section 1610 of the FSIA.[10]

B. Section 1610(g)

In 2008, Congress passed the National Defense Authorization Act ("NDAA"), Pub. L. No. 110-181, which, among other things, amended 28 U.S.C. § 1610 to add subsection (g). That section provides that:

> (1) In general. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A,

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[9] The record also includes letters from the Institute to Iran wherein the Institute promises to "a full account of our activities in behalf of [Iran]," and other assurances, but these documents do not grant Iran the power to direct the work of the Museums.

[10] Because the court finds that the commercial activity must be conducted by the sovereign, it need not reach the issue of whether the Museums' activities may be characterized as commercial activity.

> and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Plaintiffs argue that the passage of this provision allows the execution against all terror states' assets, regardless of whether they are blocked assets. Plaintiffs rely heavily on *In re Islamic Republic of Iran Terrorism Litigation*, 659 F.Supp.2d 31, 62 (D.D.C. 2009) ("*In re Terrorism Litigation*"), in which Chief Judge Lamberth stated that the NDAA added "new provisions that are plainly intended to limit the application of foreign sovereign immunity."

Defendants argue that plaintiffs did not raise the applicability of Section 1610(g) in the previous appeal of this case to the Seventh Circuit, and are therefore precluded from arguing its applicability on summary judgement because of the mandate rule. They further argue that Section 1610(g) is not an independent exception to immunity, but rather was intended to aid in the execution against property regardless of whether the property belongs to a foreign sovereign or an agent or instrumentality of the sovereign. According to defendants, Congress passed this amendment to Section 1610 to counter the Supreme Court's ruling in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*"), which held that the separate juridical status of a foreign state's instrumentalities and agencies should be respected, and those entities should be accorded a presumption of independent status.

The mandate rule dictates that "any issue that could have been but was not raised on appeal is waived and thus not remanded." *United States v. Chaidez*, 2013 WL 3819658, at *3 (N.D. Ill. July 22, 2013). In 2009, Iran appealed two discovery-related orders by the district judge previously assigned to this case. The first order found that "the immunity codified in § 1609 is an affirmative defense personal to the foreign sovereign and must be specially pleaded[;]" the second order allowed discovery regarding all Iranian-owned assets located in the United States. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011). Defendants argue that plaintiffs should have raised the

application of Section 1610(g) before the Seventh Circuit in that appeal when arguing that Iran's assets were not immune from attachment and that plaintiffs were therefore entitled to general asset discovery.

The court concludes that the mandate rule does not preclude plaintiffs from arguing the applicability of Section 1610(g). The Seventh Circuit's previous decision dealt narrowly with discovery-related issues and made no findings about whether any assets would be subject to attachment. At this early stage of the proceedings, the Seventh Circuit discussed the issue of "discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA," noting that courts must "proceed narrowly, in a manner that respects the statutory presumption of immunity." *Id.* at 796. The court made no specific findings about the potential basis for immunity or any exceptions that would limit plaintiffs' Section 1610(g) argument at this juncture.

However, plaintiffs' Section 1610(g) argument nonetheless fails. First, if Section 1610(g) provided a separate basis for attachment that allowed the execution against all terror states' assets, regardless of whether they are blocked assets, certain subsections of Section 1610 would be unnecessary. Subsection (a)(7) provides that when "the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)," the property of the foreign state used for a commercial activity is not immune from attachment "regardless of whether the property is or was involved with the act upon which the claim is

based." Similarly, subsection (b)(3) provides the same for agencies and instrumentalities of the foreign state. Essentially, under those subsections, plaintiffs who obtain judgments under Section 1605A may invoke the commercial activity exception. If Section 1610(g) simply allowed the attachment of all property whether used for commercial activity or not, then subsections (a)(7) and (b)(3) would be inconsistent, because they require a relation to commercial activity. It is the court's duty "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations and citations omitted). Plaintiffs' interpretation of Section 1610(g) is therefore inconsistent with that cannon of statutory interpretation. Additionally, plaintiffs have virtually no support for their contention that Section 1610(g) expands the bases for attachment. As the court noted in *In re Terrorism Litigation*, upon which plaintiffs rely heavily, acknowledge that the "implications of § 1610(g) are far from clear." 659 F.Supp.2d at 62.

The new subsection includes the key phrase that "the property of a foreign state . . . and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*." 28 U.S.C. § 1610(g) (emphasis added). The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections. In light of this reading, defendants' argument that Section 1610(g) was enacted to supercede *Bancec* is consistent with the construction of the statute. As

the United States points out in its Statement of Interest, subsections (A) through (E) of Section 1610(g) mirror the factors suggested in *Bancec* as determinative of whether an instrumentality of a foreign government functions as an alter ego of that government. *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1381 (5th Cir. 1992). As other courts have held, the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 442 (D.D.C. 2012) *aff'd sub nom. Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013).

The court therefore finds that Section 1610(g) does not provide a new basis for plaintiffs to attach the assets of Iran, and does not subject the collections in question to attachment and execution.

III. Attachment under the Terrorism Risk Insurance Act

Plaintiffs claim that Section 201 of the Terrorism Risk Insurance Act ("TRIA"), 28 U.S.C. § 1610 note, permits the attachment of all the Iranian artifacts in question. Section 201 provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party

> on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Plaintiffs argue that Iran is a "terrorist party" as defined in TRIA, and that plaintiffs obtained a judgment on a claim for which Iran was not immune under 28 U.S.C.§ 1605(a)(7). Plaintiffs further argue that the artifacts in question are "blocked assets" under TRIA, and therefore subject to attachment. Defendants dispute that the artifacts are "blocked assets."

Section 201(d)(2)(A) defines a "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act." In 1979, President Carter's Executive Order 12170 ("EO 12170") froze all Iranian assets in the United States, including the collections in question. Defendants argue that the Algiers Accords[11]

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[11] The Algiers Accords, 20 I.L.M. 224, was an agreement between the U.S. and Iran signed on January 19, 1981. Under the Accords, "the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," *ibid.*, and (with some exceptions) to "arrange, subject to the provisions of U.S. law applicable prior to November 14,

and the subsequent executive orders that implemented the Accords, including Executive Order 12281, 46 Fed. Reg. 7.923 (Jan. 19, 1981) ("EO 12281"), then unblocked the assets and that the assets remain unblocked. Plaintiffs contend that neither EO 12281 or the Accord unblocked the assets.

EO 12281 mandated that "[a]ll persons subject to the jurisdiction of the United States in possession or control of properties . . . owned by Iran . . . transfer such properties[ ] as directed . . . by the Government of Iran." 1-101. EO 12281 and Algiers Accords unblocked most Iranian assets that existed in the U.S. at the time. See *Weinstein v. Islamic Rep. Of Iran*, 609 F.3d 43, 55 (2d Cir. 2010). Under Treasury Department regulations, some exceptions to EO 12281 allowed certain Iranian assets to remain blocked. The Treasury Department regulation defines the properties unblocked by EO 12281 as "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). That regulation further states that a property interest is "contested only if the holder thereof reasonably believes that Iran does not

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1979, for the transfer to Iran of all Iranian properties," *id.*, at 227. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 370, 129 S. Ct. 1732, 1736, 173 L. Ed. 2d 511 (2009) (internal quotations and citations omitted). Subsequent to the signing of the Accords, President Regan lifted legal prohibitions against transactions involving Iranian property. *See* Exec. Orders Nos. 12277-12282, 3 CFR 105-113 (1981 Comp.); 31 CFR §§ 535.211-535.215 (1981).

have title or has only partial title to the asset." 31 C.F.R. § 535.333(c).

Because different facts apply to the ownership of each of the collections, and thus the "blocked" or "unblocked" status of the artifacts, the court will address them separately.

A. The Persepolis Collection and the Chogha Mish Collection

In their briefs, both Iran and the Institute agree that the Persepolis Collection and the Chogha Mish collection ultimately belong to Iran. Plaintiffs argue that the history of the Persepolis Collection has long been disputed, and that in a previous filing defendants had characterized Iran's interest in the objects as a "reversionary interest" only. According to plaintiffs, this characterization demonstrates a contest as to ownership, despite defendants' claims. Further, because Iran filed a claim in the Iran-U.S. Claims Tribunal against the United States in 1983 regarding the objects missing from the Chogha Mish Collection, plaintiffs argue that ownership of that collection is also disputed.

Regarding the Persepolis Collection, the filing that plaintiffs cite containing the language about the reversionary interest is a motion for a protective order filed by the University of Chicago and the Institute in June 2004 in the instant case. Although the motion does state that the National Museum of Iran "has only a reversionary interest[,]" the motion goes on to explain that this reversionary interest is a "right to ultimate

ownership and return." Plaintiffs attempt to argue that a reversionary interest leaves a party with only a portion of the title of the object, but they cite no cases demonstrating that granting a current possessory interest to the Museums divests Iran of its title. The Museums' assertion of a possessory interest is not equivalent to a claim that Iran does not own the collections. The terms of the academic loan require the Institute to return that collection to Iran after the academic study is complete. Thus, plaintiffs' argument that the Museums have disputed the ownership of the Persepolis Collection is without merit.

Regarding the Chogha Mish collection, defendants claim that there is no dispute as to the ownership of the collection. As an initial matter, the proceedings in the Tribunal are not between Iran and the Museums, but are instead between the United States and Iran. Any conflict between those parties does not presume an objection on the part of the possessing museum. As the government points out in its Statement of Interest, the Treasury department regulations implementing the Algiers Accords make it clear that for an asset to be "contested," the contest must be between Iran and the property holder. *See also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 56-58 (1st Cir. 2013). Further, the record confirms that ownership of the collection is not one of the issues in the claim before the Iran-U.S. Claims Tribunal. Iran's claim before the Tribunal focuses on returning the objects that were not turned over in 1970 with the rest of the collection. Ownership of the collection is not disputed, and therefore, the objects are not "blocked" assets under TRIA.

Plaintiffs further argue that Executive Order No. 13,599, 77 Fed. Reg. 6,659 (Feb. 5, 2012) ("EO 13,599") made the collections "blocked assets." EO 13,599, however, does "not apply to property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981, and implementing regulations thereunder." *Id.* at 6,660. Because this court has already found that the assets were blocked under EO 12170 and unblocked under EO12281, EO 13,599 does not apply to the collections and does not render the assets "blocked" under TRIA.

Because the assets in question are not "blocked" under TRIA, they are not subject to attachment by the plaintiffs under that statute.

B. The Museum Collections

The Museums argue that the Museum Collections are not subject to attachment under TRIA because the Museum Collections are not the assets of Iran and are not "blocked" assets. Regarding the second point, the Museums rely on EO 12281, the Order that unblocked "all uncontested and non-contingent liabilities and property interests" of Iran. As noted above, property is contested "only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset." 31 C.F.R. 535.333(c). The Museums assert that Iran does not have title to the assets, but

they cite the First Circuit's opinion in *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57-58 (1st Cir. 1013 [sic]), for the proposition that an asset cannot be considered blocked under TRIA unless Iran itself asserts a claim of ownership over it. The Museums argue that Iran has never asserted ownership of the Museum Collections, and therefore those collections are unblocked assets not subject to attachment.

Plaintiffs argue that the Museum Collections were not unblocked by EO 12281 because the artifacts were contested at the time of the order. According to plaintiffs, the lack of evidence of provenance demonstrates Iran's ownership interest in the antiquities, and ownership of the antiquities is contested. Further, plaintiffs state that Iran "always contests ownership of items taken without permission."

The record does not demonstrate that Iran has asserted any claim of ownership over the Museum Collections, despite plaintiffs' broad statement that Iran "always contests" the ownership of its antiquities removed from the country. Plaintiffs support this argument with a number of cases before British courts wherein Iran contested the removal of artifacts that it alleged had been improperly removed.[12] These cases

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[12] For example, plaintiffs cite a letter from a British law firm on behalf of Iran to a London gallery regarding a number of items that the London gallery had advertised for sale. The letter states that those items were considered of historical interest, and as such, proper authorization was required before those items could be removed. The letter further states that it is the position of the law firm that ownership of those items remained with Iran.

and submissions do not, however, indicate that Iran has offered any claim of ownership over the Museum Collections at issue here. As a result, the record does not support plaintiff's argument that Iran has disputed the ownership of these particular collections.

Although plaintiffs correctly argue that the First Circuit's decision in *Rubin v. Islamic Republic of Iran*, 709 F.3d 49 (1st Cir. 2013), is not controlling, it is well-reasoned and persuasive. The First Circuit considered the submission of the United States Department of the Treasury's Office of Foreign Assets Control (OFAC), which cited and interpreted the language of EO 12281 and the Treasury regulations. Those regulations required a transfer of properties only "as directed . . . by the Government of Iran." 46 Fed.Reg. at 7,923; 31 C.F.R. § 535.215(a). OFAC argued that this language applied to the rest of the regulations regarding the transfer of assets such that Iran must actively direct the transfer of an asset or assert ownership in order to render an asset contested. The First Circuit deferred to OFAC's interpretation of the regulations, finding that "an asset can be 'contested' for purposes of 31 C.F.R. § 535.333 only if Iran itself has claimed an interest in the asset." *Rubin v. Islamic Republic of Iran*, 709 F.3d at 57-58.

The court finds the reasoning of the First Circuit and the interpretation by OFAC compelling.[13] The language cited by OFAC demonstrates that EO 12281 and

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[13] Plaintiffs urge the court not to rely on OFAC's interpretation because the U.S. is a litigant in any case interpreting

Treasury's implementing regulations intended that only assets contested by Iran, and not by third parties such as judgment creditors, would remain blocked and therefore subject to attachment. The court therefore holds that Iran itself must contest the ownership of the property in order to render an asset contested, and therefore blocked, under the TRIA. Because Iran has not claimed ownership of the antiquities in the Herzfeld Collection or the OI Collection, those assets are not contested or blocked, and therefore are not subject to attachment under TRIA.[14]

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the TRIA, and because an agency's interpretation should only be used when the regulation is ambiguous. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011). Both parties' readings of the regulation are plausible and the court must therefore turn to the agency's interpretation of the regulation for guidance, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (internal citations and quotation marks omitted). Plaintiffs further argue that courts should not defer to the position [sic] the U.S. when that position is announced during litigation in which the U.S. is participating. However, as the First Circuit noted, "[t]he fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case." *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57 (1st Cir. 2013) (citing *Rep. of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004), and *Estate of Heiser v. Islamic Rep. of Iran*, 885 F.Supp.2d 429, 440-41 (D.D.C. 2012).

[14] In support of their argument that TRIA and the FSIA are applicable to the Herzfeld and OI Collections, plaintiffs contend that Iran owns the artifacts, not the Museums. Because the court has found that even if the artifacts were owned by Iran, the commercial activities exception would not apply and the artifacts do not qualify as "blocked" assets, it is unnecessary for the court to reach the question of ownership.

CONCLUSION

The court recognizes the tragic circumstances that gave rise to the instant action, but finds that the law cited by plaintiffs does not offer the remedy they seek.

For the foregoing reasons, none of the statutes cited by plaintiffs provide a basis for the attachment and execution against any of the artifacts in the Persepolis, Chogha Mish, Herzfeld, or OI Collections. Consequently, the court grants defendants' motions for summary judgment.

ENTER: March 27, 2014

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

RELEVANT STATUTORY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that

property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state

with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of

arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any

proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY. –

(1) IN GENERAL. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay

discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL. –

(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. – The court shall hear a claim under this section if –

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1)

occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS. –

(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of

Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION. –

(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of

the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS. – For purposes of this section –

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371),

section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not

be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a

signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United

States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used

for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of

automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of

this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or

may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(c) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER. – The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS. –

(1) IN GENERAL. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to

attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or

government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

RECORD AND BRIEFS

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In the Supreme Court of the United States

JENNY RUBIN, ET AL.,
PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FIELD MUSEUM OF NATURAL HISTORY

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CORPORATE DISCLOSURE STATEMENT

The Field Museum of Natural History has no parent corporation, and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Bath Iron Works Corp. v. *Director, Office of Workers Comp. Programs*, 506 U.S. 153 (1993) 8

Board of Trustees v. *Garrett*, 531 U.S. 356 (2001) 7

Fontaine v. *United States*, 411 U.S. 213 (1973) 8

Granite Rock Co. v. *Int'l B'hd of Teamsters*, 561 U.S. 287 (2010) 9

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 7

Rudolph v. *United States*, 370 U.S. 269 (1962) 7

Southern Power Co. v. *North Carolina Public Serv. Co.*, 263 U.S. 508 (1924) 8

Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979) 8

STATUTES

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* 1

OTHER AUTHORITIES

S. Ct. Rule 10 7

S. Ct. Rule 14.1 7

S. Ct. Rule 15.2 1

INTRODUCTION

Respondent Field Museum of Natural History submits this brief in opposition principally to advise the Court of a material omission from the petition for certiorari "that bears on what issues properly would be before the Court if certiorari were granted." S. Ct. Rule 15.2.

Petitioners—judgment creditors of the Islamic Republic of Iran—sought to attach, seize, and sell four collections of antiquities in the possession of the Field Museum or the University of Chicago's Oriental Institute (together, "the Museums"). The courts below rejected that effort, and Petitioners now seek review of two legal issues—"questions of federal law pertaining to two separate executional immunity provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* (the 'FSIA')." Pet. 1-2.

But Petitioners neglect to advise this Court that, before turning to those FSIA issues in the decision below, the Seventh Circuit ruled as a threshold matter that two of the collections at issue—including the Field Museum's Herzfeld Collection—"*are not Iranian property*" *at all*. Pet. App. 9 (emphasis added). Indeed, the Seventh Circuit was explicit: "we confine our merits review to the Persepolis Collection." Pet. App. 10.

In now seeking certiorari as to that "merits review," the petition neither discloses nor challenges the separate ruling on ownership, which is outside the scope of the questions presented. Further, no such challenge could succeed in any event because this Court generally does not review matters of fact, and because Petitioners did not meaningfully dispute ownership in the court below. Accordingly, certiorari should be denied or expressly limited to the Persepolis Collection.

STATEMENT

Holding an unsatisfied monetary judgment against Iran, Petitioners initiated collection proceedings in federal court in Chicago seeking to attach four separate collections of Persian artifacts owned and/or possessed by the Field Museum and/or the University of Chicago's Oriental Institute. As the case has been brought to this Court, however, only one collection remains at issue—the Persepolis Collection.

A. The Persepolis Collection consists of tablets and tablet fragments with incised cuneiform inscriptions in the ancient Elamite language, recovered in excavations in Iran in the 1930s. It is owned by the National Museum of Iran, and has been on long-term loan to the Oriental Institute for scholarly study since 1935.

Petitioners also sought to attach a second collection owned by the National Museum of Iran—the Chogha Mish Collection, which consists of a relatively small number of clay seal impressions, recovered in excavations in Iran in the 1960s and entrusted to the Oriental Institute for study by Iranian governmental authorities. The Oriental Institute returned the last of these artifacts to Iran in 2015.

In addition, Petitioners sought to attach two collections of antiquities that do *not* belong to Iran on the incorrect theory that those items had been improperly removed from Iran and thus remained Iranian property. One such collection, the so-called "Herzfeld Collection," consists of roughly 1,200 prehistoric Persian artifacts purchased by the Field Museum in April 1945 from Dr. Ernst Herzfeld, a German archeologist who lived and worked in Persia from 1905 to 1936. In October 1945, the Field Museum sold approximately one-third of this collection to the Oriental Institute.

The fourth and final "collection" at issue—the "Oriental Institute Collection"—is not really a collection at all, but rather various artifacts of Persian origin acquired by the Oriental Institute over the course of several decades through division with Iran or gift from third parties.

(For ease of reference, the Herzfeld and Oriental Institute Collections have been, and are herein, referred to as "the Museum Collections.")

B. After discovery was complete in the district court, the Museums moved for summary judgment, showing that they own the Museum Collections and that, even if Iran were the owner, those Collections would be immune from attachment in any event. Iran also moved for summary judgment as to its Persepolis and Chogha Mish Collections.

The district court agreed that Petitioners had failed to establish any basis to attach any of the artifacts. See generally Pet. App. 49-70. Although the court found it unnecessary to definitely resolve the ownership issues (see *id.* at 70 n.14), in rejecting one of Petitioners' theories of attachment, it relied in part on the record showing that Iran has never claimed to own the Museum Collections (*id.* at 69-80)—and, indeed, has repeatedly *disclaimed* ownership of those artifacts.[1]

---

[1] *E.g.*, Doc. 647 at 8, No. 03-9370 (N.D. Ill.) (filed Aug. 23, 2013) ("Iran claims no legal interest in those objects [*i.e.*, the Museum Collections] ... the museums address their artifacts in their motion"); Doc. 272 at 8 (filed April 30, 2007) ("Iran has never claimed these items."); see also Doc. 39 at 3, No. 14-1935 (7th Cir.) (filed Aug. 29, 2014) ("Plaintiffs sought to execute on... the 'Museum Collections', which the Museums own (and to which Iran lays no claim).").

C. On the ensuing appeal, the Museums argued for affirmance on two grounds: the Museum Collections are not owned by Iran, and, even if they were, they still would not be subject to attachment. On ownership, the Museums raised four independently fatal problems with Petitioners' theory: (1) Iranian law does not automatically vest any ownership rights in Iran; (2) U.S. courts would not enforce another sovereign's regulatory interests; (3) the Museums are bona fide purchasers or recipients and own their respective collections as a matter of Illinois property law; and (4) the statute of limitations would defeat any claim to the contrary in any event. See Museums' Resp. Br. at 26-41, No. 14-1935 (7th Cir.) (filed Nov. 10, 2014).[2]

Petitioners, however, declined to address these issues, offering little more than terse, sweeping, references to supposed evidence of antiquities having been removed from Iran illegally—and no argument what-

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[2] For example, Petitioners argued that the Field Museum was on notice that Dr. Herzfeld could not pass good title because he was supposedly a "notorious thief" of artifacts and was fired on that basis after a series of problems *with the Persian authorities.* At the same time, however, Petitioners' sole argument against the Illinois statute of limitations was the discovery rule—that "Iran obviously had no way of knowing that antiquities were illegally removed without its knowledge or consent." Pls.' Opp. to Sum. J., Doc. 655 at 69, No. 03-9370 (N.D. Ill.) (filed Nov. 20, 2013). But if the Field Museum was on notice in the 1940s, then so too was Iran. In other words, given Petitioners' "evidence" (which was also problematic for various other reasons), it would have been impossible to defeat the Museum's bona fide purchaser status without simultaneously confirming that the limitations period had long since expired.

soever on Iranian or Illinois law. See Br. for Appellants at 16-18, 59-60, No. 14-1935 (7th Cir.) (filed July 21, 2014); Reply Br. at 32 (filed Dec. 4, 2014).

For its part, the Seventh Circuit found the matter of ownership dispositive as to the Museum Collections. The court explained:

> There's no dispute that the Persepolis Collection is owned by Iran and is in the physical possession of the University. The three other collections, however, are outside the reach of this proceeding for reasons relating to their present location or the absence of Iranian ownership.

Pet. App. 8. After explaining that the Chogha Mish Collection had been returned to Iran while the appeal was pending (*id.* at 8-9), the court continued:

> The Herzfeld and the Oriental Institute Collections remain within the court's territorial jurisdiction, *but they are not Iranian property.* The plaintiffs have tried to cast doubt on the legitimacy of their removal from Iran, arguing that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran's National Heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. The Museums, on the other hand, maintain that they were bona fide purchasers or recipients of these collections; *the plaintiffs have not meaningfully contested this point.*
>
> We don't need to resolve any questions about the provenance of the Herzfeld and Oriental Institute Collections or explore the circumstances under which the Museums acquired them. *As the plain-*

> *tiffs concede, Iran has expressly disclaimed any legal interest in the two collections, and the district judge found that no evidence supports Iranian ownership of these artifacts.*
>
> *The plaintiffs have not given us any reason to disturb this ruling, and we see none ourselves.* Because the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court and Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections, *we confine our merits review to the Persepolis Collection.*

Pet. App. 9-10 (emphasis added)

D. In seeking certiorari, Petitioners do not challenge the ruling that "the absence of Iranian ownership" puts the Museum collections "outside the reach of this proceeding." Pet. App. 8. Rather, the petition presents two questions involving the proper interpretation of the FSIA. Pet. i-ii. As Petitioners explain: "Both questions present pure questions of law. And, both pertain to the range of assets of a foreign state that are subject to attachment and execution by judgment creditors of the foreign state." *Id.* at 2.

REASONS FOR DENYING THE PETITION

For three reasons, the Court should deny the petition or limit review to the Persepolis Collection.

First, the petition does not challenge the Seventh Circuit's ruling on ownership, which is plainly a separate and independent ground for rejecting Petitioners' efforts to attach the Field Museum's Herzfeld Collection. Indeed, it is the *only* ground reached by the decision below: "Because ... Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections,

we confine our merits review to the Persepolis Collection." Pet. App. 10 (emphasis added).

The court below was perfectly clear as to the bases for its decision—and the petition is equally clear that it challenges only certain FSIA issues that were part of the "merits review" with respect to the Persepolis Collection. *E.g.*, Pet. i-ii (questions presented); see also *id.* at 28 ("the Iranian property upon which the petitioners seek to execute are antiquities that have been in the possession of the University of Chicago for eighty years"—*i.e.*, the Persepolis Collection).

"Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1(a). Here, the petition does not even purport to provide any basis for this Court to reopen the judgment as to the Field Museum's Herzfeld Collection. See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32-34 (1993) (dismissing writ where it would have been necessary to resolve a threshold question that was "quite distinct, both analytically and factually," from the question presented); *Bd. of Trustees* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001) (dismissing portion of writ where a constitutional question turned on a threshold issue of statutory interpretation the parties had not briefed).

Second, even if it had been presented, ownership of the Herzfeld Collection would raise a number of fact-bound issues that are inappropriate for this Court's review. See S. Ct. Rule 10 (certiorari is "rarely granted when the asserted error consists of erroneous factual findings"); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ because review of a factual matter "would be of no importance save to the litigants themselves"). In fact, if certiorari is granted as to the

Museum Collections, this case would likely turn out just like *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924), where this Court dismissed the writ upon determining that "the controverted question was ... primarily a question of fact," which was "not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto." *Id.* at 509.

Notably, factual issues figure in each of the ownership arguments raised by the Field Museum in the court below—all of which would be properly raised in this Court as alternative grounds for affirmance. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Third, Petitioners declined to engage the Museums' claims of ownership on appeal. See *supra* 4-5 (summarizing issues and appellate briefing); Pet. App. 9-10 (explaining that the Museums "maintain that they were bona fide purchasers or recipients of [the Museum Collections]" and plaintiffs "have not meaningfully contested this point"); *id.* at 10 (ruling that "the district judge found that no evidence supports Iranian ownership of these artifacts" and "plaintiffs have not given us any reason to disturb this ruling").

Accordingly, even if Petitioners had tried to challenge ownership in this Court (and they have not), and even if such issues were appropriate for this Court's review and disposition (and they are not), any such challenge would be waived. See *Bath Iron Works Corp.* v. *Director, Office of Workers Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well.") (internal citation omitted); *Fontaine* v. *United States*, 411 U.S. 213, 215 n.2 (1973)

(declining to express any view on issue that "was not raised in the Court of Appeals or in the petition for certiorari"); also *cf. Granite Rock Co.* v. *Int'l B'hd of Teamsters*, 561 U.S. 287, 306 (2010) (holding that respondent had waived argument raised in the district court, but not in the appellate court or brief in opposition).

In short, as to the Field Museum and its Herzfeld Collection, the basis for the judgment below is the separate, unchallenged, and fact-bound ruling that the artifacts in the Herzfeld Collection "are not Iranian property." Pet. App. 9. Because that ruling is plainly outside the scope of the questions presented by the petition, and inappropriate for review in any event, any grant of certiorari should be limited to the Persepolis Collection—and exclude the Field Museum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or any review by this Court of the FSIA questions presented should be expressly limited to the Persepolis Collection.

Respectfully submitted.

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In the Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides foreign states with a jurisdictional immunity against civil actions and a separate execution immunity that protects foreign states' property from execution upon a judgment. Section 1605A of the FSIA abrogates the jurisdictional immunity when a foreign state that is a state sponsor of terrorism provides material support for a terrorist act.

Petitioners seek to enforce a judgment entered pursuant to Section 1605A by executing on ancient artifacts that are the property of respondent Islamic Republic of Iran but are in the possession of a museum owned by respondent the University of Chicago. The questions presented are:

1. Whether Section 1610(g) of the FSIA abrogates the execution immunity in all cases in which a party seeks to enforce a judgment entered pursuant to Section 1605A, notwithstanding other provisions of the FSIA that provide for a more limited abrogation of execution immunity in such cases.

2. Whether Section 1610(a)(7) of the FSIA, which abrogates the execution immunity when a party holding a judgment entered pursuant to Section 1605A seeks to execute upon "[t]he property of a foreign sovereign * * * used for a commercial activity in the United States" extends to property that is not used for a commercial activity by the foreign sovereign itself.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

ARGUMENT 10

I. The Court of Appeals' Holding that Section 1610(g) Does Not Establish a Freestanding Exception To Immunity Does Not Warrant Further Review 10

A. This Court's Review Is Not Needed To Resolve a Disagreement Among the Courts of Appeals 10

B. The Court of Appeals' Decision Is Manifestly Correct 15

II. The Court of Appeals' Interpretation of Section 1610(a)(7) Does Not Merit Further Review ... 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d (9th Cir. 2007) 5, 20

Aurelius Capital Partners v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009) 5, 20

Autotech Technologies LP v. Integral Research & Development Corp., 499 F.3d (7th Cir. 2007) . . . 5

Bennett v. Islamic Republic of Iran, 799 F.3d 1281 (9th Cir. 2015) 9, 10

Bennett v. Islamic Republic of Iran, 825 F.3d 950 (9th Cir. 2016) . . . . . *passim*

Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d (5th Cir. 2002) 5, 20

First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) 6, 7, 8, 15, 17

Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014) 8, 9, 12, 14

Kirschenbaum v. 650 Fifth Avenue and Related Properties, 830 F.3d 107 (2d Cir. 2016) 11, 12

Republic of Aregntina v. NML Capital, Ltd., 134 S.Ct. 2250 (2014) 19

Republic of Argentina v. Weltover, 504 U.S. 607 (1992) 13, 19

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 1

Weinstein v. Islamic Republic of Iran,
831 F.3d 470 (D.C. Cir. 2016) 11, 12

Wyatt v. Syrian Arab Republic,
800 F.3d 331 (7th Cir. 2015) 8, 9, 12, 14

STATUTES

28 U.S.C. §§ 1330, 1602 *et seq* 1

28 U.S.C. § 1602 ..... 4, 13, 19

28 U.S.C. § 1604 1

28 U.S.C. § 1605(a)(2) 19

28 U.S.C. § 1605(a)(7) 2

28 U.S.C. § 1605A 2, 3, 15, 16

28 U.S.C. § 1609 ..... 1, 3, 16

28 U.S.C. § 1610 ..... 1, 11

28 U.S.C. § 1610(a) 5, 10, 14

28 U.S.C. § 1610(a)(7) ..... *passim*

28 U.S.C. § 1610(b) 14

28 U.S.C. § 1610(b)(3) 8, 16, 17

28 U.S.C. § 1610(c) 14

28 U.S.C. § 1610(g) ..... *passim*

28 U.S.C. § 1610(g)(1) 7

28 U.S.C. § 1611(a) 1

28 U.S.C. § 1611(b) 1, 13

28 U.S.C. § 1611(c) 1

28 U.S.C. § 1616(a)(7) 4

28 U.S.C. § 1616(g) 13

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 11

RULE

7th Cir. R. 40(e) 9

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, codifies the "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Subject to certain exceptions, foreign states are "immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. In addition to that jurisdictional immunity, the FSIA provides an execution immunity: even if a court has lawfully asserted jurisdiction over a foreign state and entered judgment against it, the FSIA specifies that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided" in Section 1610 of the FSIA, 28 U.S.C. § 1610.[1] This case concerns two of the exceptions to execution immunity listed in Section 1610, Section 1610(a)(7) and Section 1610(g), both of which refer to judgments entered in cases involving state-sponsored terrorism.

2. Petitioners are individuals who were injured by a terrorist attack carried out by Hamas in Jerusalem in 1997. Pet. App. 1-2. They sued respondent the Islamic Republic of Iran in the United States District Court for the District of Columbia, alleging that Iran provided material support to the attackers. Id. at 2. Petitioners

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[1] Section 1609 also refers to Section 1611 of the FSIA, which provides that "[n]otwithstanding the provisions of section 1610" certain property of foreign states remains immune from attachment and execution. See 28 U.S.C. § 1611 (a), (b), (c).

invoked an exception to jurisdictional immunity, now codified at 28 U.S.C. 1605A, for damages actions against state sponsors of terrorism that provided material support for a terrorist attack.[2] The district court entered a default judgment for $71.5 million against Iran. Pet. App. 2.

Petitioners registered the judgment in the Northern District of Illinois and sought to attach and execute on the Persepolis Collection, a collection of Persian artifacts that are in the possession of respondent the University of Chicago. Pet. App. 6, 8.[3] Iran had lent the Persepolis Collection to the Oriental Institute at the University of Chicago in 1937 for research, translation, and cataloguing, and nearly all of the collection has remained in the possession of the Oriental Institute since then. See id. at 4-5, 46. The collection consists of approximately 30,000 clay tablets and fragments. Id. at 4. The tablets and fragments contain some of the oldest examples of human writing in the world. Id. at 4-5.

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[2] Petitioners initially invoked 28 U.S.C. § 1605(a)(7), which provided this exception to jurisdictional immunity when petitioners sued in 2003. Congress later repealed Section 1605(a)(7) and replaced it with 28 U.S.C. § 1605A, which codifies a similar immunity. Pet. App. 5-6. Petitioners converted their Section 1605(a)(7) judgment to a Section 1605A judgment. See Pet. App. 6 n.1, 15, 22.

[3] Petitioners initially tried to attach four collections of artifacts, but the court of appeals ruled that three of those collections were not subject to the attachment proceeding, either because they were outside the territorial jurisdiction of the district court or because they were not Iran's property. See Pet. App. 8-10. Petitioners have not challenged that ruling in this Court.

In order to overcome the execution immunity provided by 28 U.S.C. § 1609, petitioners first invoked Section 1610(a)(7), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered in a court of the United States" if the judgment "relates to a claim for which the foreign state is not immune" under the terrorism exception now codified by Section 1605A. In addition, petitioners invoked the exception to execution immunity specified in Section 1610(g), which, they asserted, is "an independent exception to the execution immunity available to victims of state-sponsored terrorism." Pet. App. 7.

3. The district court granted respondents' motion for summary judgment. Pet. App. 71. The district court reasoned that the Section 1610(a)(7) exception for "property * * * used for a commercial activity in the United States" applied only to property used by the foreign state itself for a commercial purpose. Pet. App. 50-57. Because Iran did not use the Persepolis Collection for a commercial purpose, the Section 1610(a)(7) exception did not apply to that property, and the property was immune from attachment and execution. See Pet. App. 57. The district court also rejected petitioners' argument that Section 1610(g) is an independent exception to execution immunity. Id. at 60-62.

3.a. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1-38. The court of appeals, like the district court, rejected petitioners' argument that the "commercial activity" exception in

Section 1610(a)(7) applied to the Persepolis Collection. The court of appeals said it was "skeptical that academic study qualifies as a commercial use" but that it would "put that question aside" because "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." Pet. App. 20 (emphasis in original). The court noted that petitioners did not contend that Iran had used the Persepolis Collection for a commercial activity in the United States. Id. at 20-21.

The court of appeals explained that Section 1610(a)(7) should be interpreted in light of Section 1602 of the FSIA, the statute's declaration of purpose, which "explicitly invokes the international law understanding of foreign sovereign immunity" and treats the foreign state's own commercial activity as the basis for overcoming immunity:

> "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities."

Pet. App. 17, quoting and adding emphasis to 28 U.S.C. § 1602. The court of appeals rejected petitioners' contention that Section 1602 was equivalent to legislative history and should therefore be disregarded in light of what petitioners characterized as the unambiguous language of Section 1616(a)(7). The court pointed out that Section 1602 was not, in fact, legislative history, but had been enacted into law as part of the FSIA. The court also said that, in any event,

Section 1610(a)(7) was at least ambiguous on the question of which entity's commercial activity mattered. See Pet. App. 18.

The court also reasoned that "[t]he FSIA starts with a baseline rule of execution immunity" so that "the exceptions are few and 'narrowly drawn.'" Pet. App. 19, quoting *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 749 (7th Cir. 2007). "Given the broad protective stance of the statutory scheme in general," the court concluded, any ambiguity in Section 1610(a)(7) had to be construed to apply the exception only to the foreign state's own commercial activities. Pet. App. 19.

In reaching this conclusion, the court of appeals explicitly agreed with the decisions of three other courts of appeals—the Second, Fifth, and Ninth Circuits—all of which, the Seventh Circuit said, had limited the Section 1610(a)(7) exception to commercial activity by the foreign state itself. See Pet. App. 16-17, citing *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007). The court accordingly "join[ed] the emerging consensus of our sister circuits" to "hold that a third party's commercial use of a foreign state's property does not trigger the § 1610(a) exception to execution immunity. Rather, § 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity" (Pet. App. 20; emphasis in original).

3.b. The Seventh Circuit also rejected petitioners' argument that Section 1610(g) provided an independent exception to execution immunity in terrorism cases. Section 1610(g) provides in part:

> (1) * * * [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The court of appeals explained (Pet. App. 4, 22-26) that this provision was a response to this Court's decision in *First National City Bank v. Banco Para El Comercio*

Exterior de Cuba ("Bancec"), 462 U.S. 611 (1983). *Bancec* held that a judgment against a foreign sovereign cannot be executed on property owned by a juridically separate instrumentality of the foreign government. Id. at 626-29. *Bancec* allowed, however, that a judgment creditor could execute on the property of an instrumentality if the instrumentality and the sovereign were alter egos, or if refusing to allow execution would work an injustice. Id. at 628-33.

In the wake of this Court's decision in *Bancec*, courts of appeals "began to coalesce around a set of five factors for determining when the exceptions" to the *Bancec* rule applied. Pet. App. 23. The court below showed that the five subsections of Section 1610(g)(1) corresponded closely to the five factors that the lower courts developed. See Pet. App. 25-26. The court concluded that "Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments." Id. at 26.

The court of appeals rejected petitioners' contention that Section 1610(g) went further and abrogated execution immunity entirely for such judgments. The court noted that Section 1610(g) made property "subject to attachment in aid of execution, and execution * * * *as provided in this section*" (28 U.S.C. 1610(g)(1) (emphasis added); see Pet. App. 27). The italicized phrase dictated that petitioners had to come within one of the other exceptions in Section 1610, such as Section 1610(a)(7), in order to execute upon Iran's property; Section 1610(g) just meant that if petitioners came within another provision in Section 1610, *Bancec* would not be a barrier to executing upon the property of an instrumentality of Iran. But petitioners'

construction of Section 1610(g) effectively read the italicized phrase out of the statute entirely. See Pet. App. 27, 35.

In addition, Section 1610 contains two other exceptions to execution immunity for terrorism-related judgments, both of which are limited to commercial activity: Section 1610(a)(7), which applies to property of a foreign state used for commercial activity in the United States; and Section 1610(b)(3), which applies to the property of an agency or instrumentality of a foreign state engaged in commercial activity in the United States. See Pet. App. 27-28, citing 28 U.S.C. §§ 1610(a)(7), 1610(b)(3). Petitioners' interpretation of Section 1610(g) would make those provisions superfluous. See Pet. App. 27-28. In any event, the court of appeals reasoned, the recitation of the five *Bancec*-related factors in Section 1610(g) was evidence that that provision was "a corrective measure * * * plainly aimed at eliminating the *Bancec* barrier" rather than "creating a new and independent exception to execution immunity for all terrorism-related judgments." Pet. App. 26.

Petitioners had invoked two previous Seventh Circuit decisions, *Gates v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014), and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015), both of which, petitioners said, treated Section 1610(g) as a freestanding exception to execution immunity. The court below acknowledged that there was language in the opinions in those cases that supported petitioners' argument. Pet. App. 28, 31. But the court below noted that in *Gates*, any holding on the scope of Section 1610(g) was unnecessary to the decision, see Pet. App.

29; that *Wyatt* had simply relied on the discussion in *Gates*, Pet. App. 31; and that neither opinion had "grappled with the fundamental interpretive question presented" by Section 1610(g). Pet. App. 31. "To the extent that *Gates* and *Wyatt* can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments," the court said, "they are overruled." Pet. App. 34-35 (footnote omitted). The court also disagreed with the Ninth Circuit's conclusion, in *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281 (9th Cir. 2015), petition for certiorari pending, No. 16-334 (filed Sept. 12, 2016), that Section 1610(g) established a freestanding exception to execution immunity. See Pet. App. 32-34. The court noted that the Ninth Circuit's decision in *Bennett* had relied on *Gates* and *Wyatt*. Pet. App. 34.

4. Judge Hamilton, who was not on the panel that decided the case, filed a dissent from the denial of rehearing en banc. Pet. App. 39-40. Seventh Circuit Rule 40(e) provides that a panel opinion that "would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court" so that they may consider whether to rehear the case en banc. The panel noted that it had circulated its opinion, but five active judges did not participate in considering the case for rehearing en banc "so a majority did not vote" for en banc rehearing. Pet. App. 35 n.6. Judge Hamilton said that the panel's decision "to overrule circuit precedent and create a circuit split without meaningful Rule 40(e) review" was "a mistake." Id. at 39. "In this rare situation" in which the recusal of a number of judges made it "impossible to hear this case en banc," Judge

Hamilton concluded, "one panel's decision to overrule another's decision should not be treated as settling the legal issue in this circuit." Ibid.

ARGUMENT

The decision of the court of appeals is correct. Whatever disagreement exists among the courts of appeals concerning the interpretation of Section 1610(g) does not warrant this Court's review. Petitioners do not even assert that there is a disagreement among the courts of appeals on the interpretation of Section 1610(a), and that issue, also, does not merit further review.

I. The Court of Appeals' Holding that Section 1610(g) Does Not Establish a Freestanding Exception To Immunity Does Not Warrant Further Review

A. This Court's Review Is Not Needed To Resolve a Disagreement Among the Courts of Appeals

Petitioners assert (Pet. 21-22) that the decision of the court below on the scope of Section 1610(g) conflicts with the Ninth Circuit's decision in *Bennett*, and with the decisions of two other courts of appeals, in a way that calls for this Court's intervention. For a number of reasons, petitioners are mistaken.

1. In each of the cases petitioners cite, the court's resolution of the Section 1610(g) issue was unnecessary to the disposition of the case. Indeed, petitioners effectively concede as much, asserting only that the Section 1610(g) issue "was case dispositive in the Seventh Circuit." Pet. 22. In each of the instances that

petitioners invoke, therefore, the courts of appeals may not consider themselves bound by the conclusion that Section 1610(g) establishes a freestanding exception to execution immunity.

In *Bennett*, the Ninth Circuit's conclusion that the Section 1610(g) established a freestanding exception to execution immunity was an alternative ground for the holding. The Ninth Circuit considered Section 1610(g) only after it had held that the assets in question were subject to attachment under Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322, codified at 28 U.S.C. § 1610 note. See *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 957-58 (9th Cir. 2016). After reaching that conclusion, which was sufficient to decide the case, the Ninth Circuit went on to assert that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." 825 F.3d at 959. The *Bennett* panel could have reached the same result—a holding that the property in question could be executed upon—without addressing Section 1610(g) at all.

Petitioners also mention, in passing, *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016), and *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107 (2d Cir. 2016). See Pet. 22. In each of those cases, the courts' statements about Section 1610(g) were dicta; the courts held that the property in question could *not* be attached. See *Weinstein*, 831 F.3d at 472-73; *Kirschenbaum*, 830 F.3d at 141-42. Perhaps more important, in both cases, the courts merely asserted, in a single sentence with no analysis, that Section 1610(g) reached all property of a

foreign state in an attachment proceeding pursuant to a judgment entered under Section 1605A; after that conclusory assertion, the courts proceeded to a thorough explanation of why the property at issue could not be attached for other reasons. See *Weinstein*, 831 F.3d at 483; *Kirschenbaum*, 830 F.3d at 123. When those courts made their assertions about Section 1610(g), they were in effect assuming arguendo that the FSIA execution immunity did not bar attachment, before addressing the central question in the case--whether attachment was barred on other grounds—and concluding that it was. Future panels in those circuits may well feel free to disregard the conclusory statements about Section 1610(g).

2. Even in the Ninth Circuit—the only other court of appeals, besides the court below, that engaged in any analysis of the issues raised by Section 1610(g)—*Bennett*'s conclusion may be ripe for reconsideration. That is because the *Bennett* court, having acknowledged that Section 1610 "is ambiguous" (825 F.3d at 961), relied explicitly on the Seventh Circuit's decisions in *Wyatt* and *Gates*. See 825 F. 3d at 960-61. The Seventh Circuit has now ruled that those decisions, to the extent they support the notion that Section 1610(g) establishes a freestanding exception to immunity, are no longer good law. A significant underpinning of the *Bennett* court's conclusion has therefore been removed.

3. There is a reason that no court has endorsed petitioners' interpretation of Section 1610(g) in any case in which that interpretation mattered. Petitioners' interpretation of Section 1610(g) is extremely far-reaching. As Judge Benson, who dissented from the

Bennett court's ruling about the scope of Section 1610(g), pointed out, the interpretation embraced by *Bennett* and petitioners would "open the floodgates and allow terrorism plaintiffs to attach any and all Iranian property in the United States." *Bennett*, 825 F.3d at 969 (Benson, J., concurring in part and dissenting in part).

If petitioners' interpretation of Section 1616(g) were to prevail, for example, a foreign state's property might be seized even if the state were using it entirely in a sovereign, non-commercial, capacity.[4] That is well beyond the historical understandings of the power of a state over the property of a foreign state. As this Court has explained, when the FSIA was adopted, the "then-prevailing restrictive theory of sovereign immunity"—the theory that, the Court said, "is of significant assistance in construing the scope of the Act" -- was based on "the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other" (*Republic of Argentina v. Weltover*, 504 U.S. 607, 613-14 (1992)). And as the court below said, that distinction is embraced by Section 1602 of the FSIA, the statute's declaration of purpose. See 28 U.S.C. § 1602. Petitioners' view of Section 1610(g) would run roughshod over that distinction.

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[4] Section 1611(b) of the FSIA provides that the Section 1610 exceptions to sovereign immunity do not apply to certain property of foreign states' central banks, or to certain military property. See 28 U.S.C. § 1611(b). But on petitioners' view, the FSIA would not protect other forms of sovereign property from seizure pursuant to Section 1610(g).

In all the cases that petitioners cite as disagreeing with the Seventh Circuit, the courts did not have to confront the sweeping implications of the view that Section 1610(g) establishes a freestanding exception to immunity.[5] The one case in which those implications were clear is this case: where petitioners' view would allow the seizure of ancient artifacts from a museum to which they have been lent for study and research. This Court should wait until petitioners' expansive view of Section 1610(g) is adopted by a court that is prepared actually to authorize the seizure of foreign government assets that would otherwise be immune. So far no court has done so.

4. For reasons we give below, we believe that the Seventh Circuit's interpretation of Section 1610(g) in this case is plainly correct. But the uncertain status of the law in the Seventh Circuit is nonetheless relevant to this Court's determination whether to grant review. Because so many active judges were unable to participate in the decision whether to rehear the decision of the panel in this case, the panel's disapproval of the earlier Seventh Circuit decisions in *Gates* and *Wyatt* has not yet been accepted by the en banc court. Judge Hamilton, who wrote the opinions in *Gates* and *Wyatt*, was emphatic in stating both that he

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[5] This is also true of *Gates* and *Wyatt*, the Seventh Circuit decisions with which the panel below disagreed. In those cases, the dispute to which Section 1610(g) was relevant concerned not whether certain assets could be executed upon, but whether judgment creditors had to comply with the notice requirement of Section 1610(c). That requirement applies to attachment and execution under Sections 1610(a) and (b) but does not refer to subsection (g). See 28 U.S.C. § 1610(c).

disagreed with the panel in this case and that the panel's decision "should not be treated as settling the legal issue in this circuit." Pet. App. 39.

In sum, even the decision of the court below cannot be regarded as having finally settled the interpretation of Section 1610(g) in the Seventh Circuit; no other court of appeals has decided the issue in a case in which the decision affected the holding of the case; there is reason to think that other courts, if confronted with the implications of their dicta, would hesitate to embrace petitioners' far-reaching claim; and even in the Ninth Circuit, the only other court that discussed the issue in anything other than a conclusory fashion, the ruling was unnecessary to the disposition of the case and rested, to a degree, on precedential foundations that have eroded. In these circumstances, no true circuit split exists. This Court's intervention is not warranted.

B. The Court of Appeals' Decision Is Manifestly Correct

Petitioners' interpretation of Section 1610(g) is irreconcilable with both the language of that provision and other provisions of the FSIA—another reason to believe that other courts of appeals will not accept that interpretation when the issue is squarely posed. As the court below explained, Section 1610(g) removes a barrier that *Bancec* imposed to executing upon assets belonging to instrumentalities of a foreign state against which a Section 1605A judgment has been entered. But Section 1610(g) only removes that barrier in cases in which the judgment plaintiff otherwise has a right to execute upon the property in question. Section 1610(g)

does not constitute a freestanding abrogation of sovereign immunity.

The language of Section 1610(g) makes this explicit: when a judgment has been entered against a foreign state under Section 1605A, Section 1610(g) makes the property of that state and its instrumentalities "subject to attachment in aid of execution, and execution * * * *as provided in this section*." 28 U.S.C. § 1610(g) (emphasis added). The "section" is Section 1610, which the FSIA specifically identifies as the locus of exceptions to execution immunity. See 28 U.S.C. § 1609. A judgment creditor proceeding under Section 1610(g) must, therefore, be able to invoke another provision of Section 1610 that authorizes execution. Neither petitioners nor the Ninth Circuit, in *Bennett*, provides any coherent explanation of how the contrary view can be reconciled with the phrase "as provided in this section."

That is only one of the textual problems with petitioners' view. Other provisions of Section 1610—Section 1610(a)(7) and Section 1610(b)(3)—specifically abrogate the immunity of, respectively, foreign states and their instrumentalities, in cases involving judgments based on Section 1605A and its predecessor. But both of those provisions contain limitations. Section 1610(a)(7) abrogates execution immunity, in terrorism-related cases, only with respect to "property in the United States of a foreign state * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) abrogates execution immunity, in terrorism-related cases, only with respect to "property in the United States of an agency or instrumentality of a foreign state engaged in

commercial activity in the United States." 28 U.S.C. § 1610(b)(3). Petitioners' interpretation of Section 1610(g) would simply cast aside those limits.

Finally, petitioners' interpretation of Section 1610(g) does not just read the phrase "as provided in this section" out of Section 1610(g) and make Sections 1610(a)(7) and (b)(3) otiose; petitioners' view makes the bulk of Section 1610(g) itself superfluous. Section 1610(g) lists the factors that lower courts had considered in establishing exceptions to the *Bancec* rule and states that execution against foreign property may proceed "regardless of" those factors. 28 U.S.C. 1610(g). If petitioners' interpretation is correct, Congress engaged in a pointless exercise when it listed those factors. Section 1610(g) could simply have ended with the phrase "execution, upon that judgment." That is an implausible way to read the provision.[6]

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[6] Should the Court, contrary to our submission, determine that the question concerning Section 1610(g) warrants further review, we respectfully submit that this case provides a more appropriate vehicle than *Bennett*. (A certiorari petition, No. 16-334, is pending in *Bennett*.) As we noted, the ruling on Section 1610(g) in *Bennett* was an alternative ground for decision. The Court would, therefore, have to grant both questions presented in the petition in *Bennett*, and rule in favor of petitioner on both issues, in order to overturn the judgment of the court of appeals. In this case, by contrast, the Court need grant only the question raising the Section 1610(g) issue.

In addition, for reasons we have given, this case reflects a factual context in which petitioners' interpretation of Section 1610(g) has concrete consequences. That is because here, unlike in *Bennett*, interpreting Section 1610(g) as a freestanding exception would permit execution upon property that would otherwise be immune. We note, in this connection, that Judge Benson, in his

II. The Court of Appeals' Interpretation of Section 1610(a)(7) Does Not Merit Further Review

Section 1610(a)(7) abrogates execution immunity in terrorism-related cases when a judgment creditor seeks to execute upon "property in the United States of a foreign state * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(7). The court of appeals held that the immunity is abrogated only when the foreign state itself uses the property for commercial activity, not when a third party does so. This ruling is correct and is consistent with the decisions of every other court of appeals that has considered the issue. While petitioners disagree with these decisions, it is undisputed that no court of appeals has adopted the petitioners' construction, and petitioners provide no basis for this Court's review.

Even apart from the context provided by the FSIA, the most straightforward reading of the language of Section 1610(a)(7) is that execution immunity is abrogated only when the property is used for a commercial activity by the foreign state. The phrase "a foreign state's property used for a commercial activity" normally implies that the foreign state—the owner of the property-- is using it that way. If the authors of the phrase meant it to be more inclusive, they would add a qualifier to that effect, such as "irrespective of whether

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partial dissent from the *Bennett* court's ruling on Section 1610(g), specifically referred to the artifacts at issue in this case in describing what he considered to be the untoward effects of the *Bennett* panel's (and petitioners') interpretation of Section 1610(g). See *Bennett*, 825 F.3d at 969.

the commercial activity is that of the foreign state or of another party."

In the context of the FSIA, the limitation to the commercial activity of the foreign state itself becomes even clearer. As the court of appeals explained, the core principle of the FSIA, reflected in the language of the statute itself, reflects the international law understanding that states lack jurisdictional immunity "insofar as their commercial activities are concerned" and that "their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. That statutory provision explains why Congress thought it unnecessary to spell out that Section 1610(a)(7) referred to property used by the state itself—the crucial question is always the nature of the state's activity, not the nature of a third party's activity. See also *Republic of Argentina v. Weltover*, 504 U.S. at 613-14 (referring to "the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other" as a guide in interpreting the FSIA).[7]

As the Seventh Circuit noted, every other court of appeals that has addressed this issue has agreed. See

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[7] Moreoever, the FSIA's jurisdictional immunity exceptions expressly require activity "by the foreign state" itself. 28 U.S.C. 1605(a)(2). Interpreting 1610(a) to eliminate execution immunity on the basis of third-party acts would run counter to the this Court's plain and repeated statements that execution immunity exceptions are "narrower" that jurisdictional immunity exceptions. *See, e.g., Republic of Aregntina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2256 (2014).

Pet. App. 16-17. The Ninth Circuit explained the effects that a contrary interpretation would have:

> [T]o allow a private party's commercial use of the property to waive a foreign sovereign's immunity would not only frustrate "one of the principal goals of the FSIA"—to restrain, to the extent practicable, "judicial interference with the *jus imperii*, or sovereign acts, of a foreign state"—but would also effectively eviscerate the protections of the FSIA by placing the power to waive the foreign sovereign's immunity in the hands of private parties.

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F. 3d 1080, 1091 (9th Cir. 2007) (citations omitted). See also *Connecticut Bank of Commerce v. Republic of Congo*, 309 F. 3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009). The Seventh Circuit's ruling, which follows the ordinary meaning of Section 1610(a)(7), is even more clearly correct in light of the statutory context, and it avoids the perverse effects that would result from having a third party's behavior determine whether a sovereign state's property could be seized. Petitioners do not even assert that there is a conflict in the circuits. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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TABLE OF CONTENTS

Page

REPLY FOR PETITIONERS 1

I. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S NARROW CONSTRUCTION OF SECTION 1610(g) 2

A. The Decision Below Created An Express Conflict With The Ninth Circuit's Decision In *Bennett* 2

B. The Terrorism Exception To Execution Immunity Should Not Be Interpreted Based Upon Policies Supporting Commercial Activities Exceptions 5

C. The Seventh Circuit's Construction Of Section 1610(g) Is Wrong 7

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF SECTION 1610(a) IS WRONG AND WARRANTS REVIEW 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).....9

Bennett v. Islamic Republic of Iran, 799 F.3d 1281 (9th Cir. 2015).....2

Bennett v. Islamic Republic of Iran, 817 F.3d 1131 (9th Cir. 2016).....2

Bennett v. Islamic Republic of Iran, 825 F.3d 950 (9th Cir. 2016).....*passim*

Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010) 12

Dean v. United States, 556 U.S. 568 (2009).... 10, 11, 12

First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).....7

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) 6

Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014) 3, 4

Harrison v. Republic of Sudan, 838 F.3d 86 (2d Cir. 2016) 9, 11, 12

Kirschenbaum v. 650 Fifth Ave., 830 F.3d 107 (2d Cir. 2016) 5

Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) 13

Ministry of Def. & Support for the Armed Forces v. Cubic Def. Sys., 984 F. Supp. 2d 1070 (S.D. Cal. 2013).....7

TABLE OF AUTHORITIES – Continued

Page

Peterson v. Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2010) 3

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 6, 13

Samantar v. Yousuf, 560 U.S. 305 (2010) 11

Sun v. Taiwan, 201 F.3d 1105 (9th Cir. 2000) 13

Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.C. Cir. 2016) 5, 7

Wyatt v. Syrian Arab Republic, 800 F.3d 331 (7th Cir. 2015) 3, 4

Wyatt v. Syrian Arab Republic, 83 F. Supp. 3d 192 (D.D.C. 2015) 9

STATUTES

28 U.S.C. § 1602 11

28 U.S.C. § 1605(a)(2) 12

28 U.S.C. § 1605(a)(7) 8

28 U.S.C. § 1605A 8

28 U.S.C. § 1609 9

28 U.S.C. § 1610(a) 1, 10, 11, 12

28 U.S.C. § 1610(f) 9

28 U.S.C. § 1610(g) ..... *passim*

28 U.S.C. § 1611 9

TABLE OF AUTHORITIES – Continued

Page

RULES

Seventh Circuit Rule 40(e) 3, 4

OTHER AUTHORITIES

Vienna Convention on Diplomatic Relations 9

REPLY FOR PETITIONERS

Respondent Islamic Republic of Iran ("Iran") agrees with petitioners that the circuit split regarding the construction of 28 U.S.C. § 1610(g) presents an important question worthy of this Court's review. Iran.Resp. 1-2, 14-16. Both the *Rubin* majority and dissent expressly recognized the circuit conflict between the decision below and the Ninth Circuit's decision in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016). App. 35 n.6; App. 39. Only respondent, the University of Chicago (the "University"), the one party to this action with no claim to ownership of any of the assets at issue, denies the existence of the circuit split.[1]

The Seventh Circuit's construction of § 1610(a) departs sharply from both the statutory text and Supreme Court precedent. By erroneously declaring that its decision represents a "consensus," the Seventh Circuit would preclude further consideration of this question. Accordingly, review should be granted because this petition is likely the last chance for any court to review the Seventh Circuit's construction of § 1610(a).

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[1] The petitioners agree with the Field Museum certiorari should be limited to the Persepolis Collection.

I. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S NARROW CONSTRUCTION OF SECTION 1610(g).

A. The Decision Below Created An Express Conflict With The Ninth Circuit's Decision In *Bennett*.

1. Iran agrees that the circuit conflict "could not be starker" between the decision below and *Bennett* regarding the construction of the Foreign Sovereign Immunities Act's ("FSIA") terrorism exception to executional immunity, 28 U.S.C. § 1610(g). Iran.Resp. 14-15. Iran "agrees that the proper interpretation of § 1610(g) is an important question that has divided the courts of appeals." Iran.Resp. 14. However, the University posits that because the Ninth Circuit's decision rested on alternative grounds, *Bennett* is not binding, and no circuit conflict exists. Univ.Opp. at 10-11.

The University fails to account for the reality that the Ninth Circuit entered ***three*** separate thorough and reasoned decisions authored by two different judges, *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015); 817 F.3d 1131 (9th Cir. 2016); and 825 F.3d 950 (9th Cir. 2016), each holding that section 1610(g) provides a freestanding execution immunity exception that enables terrorism judgment creditors to enforce their judgments against the property of a foreign state regardless of whether the property is used for commercial activity. In *Bennett*, Iran/Bank Melli moved for rehearing *en banc*, but not a single judge requested a vote, and the motion was denied. Pet. *Bank Melli v. Bennett*, No. 16-334, App. 3a.

In addition to *Bennett*, a previous Ninth Circuit panel construed section 1610(g) in the same way. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010) ("judgment creditors can now reach any U.S. property in which Iran has any interest"). With four decisions uniformly construing § 1610(g) as providing an independent execution immunity exception, the question of whether these holdings are technically binding upon future Ninth Circuit panels is purely academic. As a practical matter, no Ninth Circuit panel will break with these precedents.

The University also argues that the *Rubin* decision is not binding. Univ.Opp. at 14-15. The University misunderstands the decision below and Seventh Circuit Rule 40(e). The court below overruled two prior Seventh Circuit decisions – *Gates v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014), and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015) – both of which rejected Iran's preferred construction of section 1610(g). App. 35. In a footnote, the court explained that when a panel decision either overrules circuit precedent or creates a circuit split, Seventh Circuit Rule 40(e) requires that the decision be circulated for review by all active Seventh Circuit judges before it may be published. App. 35 n.6. Upon a majority vote of active judges, the court will *sua sponte* rehear the case *en banc*. Seventh Circuit Rule 40(e).

The court circulated the decision, but a majority of active judges had been disqualified, and there was no

quorum to consider *en banc* review. App. 35 n.6. Nothing in Rule 40(e) undermines the force of decisions under these circumstances. Judge Hamilton's dissenting opinion questioned both the wisdom and propriety of the panel's actions. App. 39, 42. However, Judge Hamilton conceded that the panel had in fact overruled circuit precedent and created a circuit split. App. 39. Thus, both the majority and dissent concluded that *Rubin* overruled *Gates* and *Wyatt* and created a circuit conflict. App. 35 n.6; App. 39.

2. The University argues that *Bennett*'s authority is doubtful because the Ninth Circuit "relied explicitly" upon *Gates* and *Wyatt*, which the *Rubin* court overruled. Univ.Opp. 12. In fact, *Bennett* interpreted section 1610(g) based upon the statutory text and purpose. *Bennett*, 825 F.3d at 960. Only after reaching its conclusion did the court observe that its holding was also consistent with *Gates* and *Wyatt*. *Id.* Thus, *Rubin*'s overruling of *Gates* and *Wyatt* does not detract from the force of the Ninth Circuit's holding.

3. The University argues that no court other than the Seventh Circuit below had to confront the "sweeping implications" of the Ninth Circuit's construction of § 1610(g). Univ.Opp. 14. This argument is factually incorrect. In its motions for reconsideration in *Bennett*, Iran argued the merits of the *Rubin* case to the Ninth Circuit. In response, the Ninth Circuit explicitly confronted the implications ***for the Artifacts at issue here***, and was not swayed from interpreting the statute consistently with its text and purpose. 825 F.3d at 960 n.6. "[I]t is not our province to decide

whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern congressional intent." *Id.*

In his dissent below, Judge Hamilton also explicitly confronted the implications of *Bennett*'s interpretation of § 1610(g). He held that a true construction of § 1610(g) would allow "the *Rubin* plaintiffs to pursue broader categories of Iranian property, ***including the Persepolis Collection at the University of Chicago***." App. 42 (*emphasis supplied*). The University therefore errs when it claims that courts have not considered the implications of construing § 1610(g) as a freestanding execution immunity exception. Univ.Opp. 12-14. However, the University's concern over section 1610(g)'s long reach demonstrates that the question presented is extremely important and warrants review.

B. The Terrorism Exception To Execution Immunity Should Not Be Interpreted Based Upon Policies Supporting Commercial Activities Exceptions.

Iran and the University argue that the interpretation of section 1610(g) adopted by the Ninth, Second, and D.C. Circuits[2] "represents a substantial departure

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[2] *See Kirschenbaum v. 650 Fifth Ave.*, 830 F.3d 107, 123 (2d Cir. 2016); *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Pet. 22, 24.

from traditional immunity principles,"[3] and for this reason should be rejected. Pet. *Bank Melli*, No. 16-334, at 30-33; Univ.Opp. 13. Indeed, fundamental differences between the respective rationales underlying the terrorism exceptions and the commercial exceptions to foreign sovereign immunity *compel* different approaches.

Congress enacted the Foreign Sovereign Immunities Act in 1976 to remove the sovereign immunity protections from the commercial and other private conduct of foreign states, while retaining immunity for conduct that is "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Twenty years later, Congress began legislating immunity exceptions for state-sponsored terrorism. These new provisions addressed a unique category of state conduct – terrorism – that was not neatly cabined with the existing categories of "commercial," "private," or "sovereign."

In the terrorism exceptions, Congress has decided that state-sponsored terrorism represents "a certain category of sovereign act[]" that is so "repugnant to the United States and the international community," that it does not deserve immunity. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998). Despite, or possibly because of, the distinctly "sovereign" nature of state-sponsored terrorism, Congress decided to limit

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[3] As Iran asserts in its Bennett petition, this "departure" demonstrates the importance of the question presented, and supports granting certiorari. Pet. *Bank Melli*, No. 16-334 at 30-33.

foreign sovereign immunity in this area. As the D.C. Circuit recently held, "the terrorism activity exception is, simply put, different." *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). "Those nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit. . . .". *Ministry of Def. & Support for the Armed Forces v. Cubic Def. Sys.*, 984 F. Supp. 2d 1070, 1080 (S.D. Cal. 2013). State-sponsored terrorism is fundamentally distinguishable from state commercial activity, and the two are not subject to the same policy considerations.

C. The Seventh Circuit's Construction of Section 1610(g) is Wrong.

1. The Seventh Circuit rendered several lines of statutory text meaningless when it construed § 1610(g) as merely removing the *Bancec* barrier to enforcement of judgments against juridically independent agencies instrumentalities of foreign state judgment debtors. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"); Pet. 24-27. Specifically, if the only purpose of subsection (g) were to abrogate the separate entity rule, then subsection (g)'s references to property of the foreign sovereign itself and to property of agencies or instrumentalities that are *not* separate juridical entities would be entirely unnecessary and misleading. Congress did not enact a statute enabling plaintiffs to pierce the corporate veil between a foreign state defendant and *itself*, or between a foreign state defendant

and its instrumentalities that are *not* separate juridical entities (i.e., which *lacks* any corporate veil to be pierced). Respondents' silence on this point is tantamount to an admission that this language cannot be reconciled with the Seventh Circuit's construction of § 1610(g) as a mere veil-piercing provision.

Contrast the Ninth Circuit's construction of Section 1610(g) under which those lines mean what they say: Terror victim judgment creditors can now enforce their judgments against the "property" – even non-commercial property – of "a foreign state against which a judgment is entered under section 1605A," and against "the property of an agency or instrumentality of such a state," whether or not the agency or instrumentality is juridically independent. *And*, the *Bancec* factors listed in the statute are not an obstacle to any such enforcement.

The Seventh Circuit and respondents read the clause, "as provided in this section" as modifying the type of property to which § 1610(g) applies. This construction not only renders meaningless an entire swath of statutory language, as explained above, it also fails to account for the clause's placement within the statute. Thus, *Bennett* explained that the clause, "as provided in this section" refers, "at a minimum" to the rules contained in subsection (f), which like subsection (g), was enacted to facilitate enforcement of judgments entered under the terrorism exceptions to jurisdictional immunity found in § 1605A, and its predecessor, § 1605(a)(7). *Bennett*, 825 F.3d at 959-60 n.6. The Ninth Circuit accounts for every word in § 1610(g). *Rubin*, by

contrast, renders much of § 1610(g) meaningless or unintelligible.

2. Iran argues that under *Bennett*'s construction, "§ 1610(g) imposes no limitations at all on the types of property subject to execution . . . " and that even diplomatic property would be subject to attachment. Iran.Resp. 20. The University, however, recognizes that § 1611 limits the sovereign property subject to execution under § 1610(g) by immunizing certain foreign central bank or monetary authority property and certain property used in connection with military activity. Univ.Opp. 13 n.4.

Similarly, the Ninth Circuit's construction of § 1610(g) does not enable execution upon diplomatic assets in violation of the Vienna Convention on Diplomatic Relations ("VCDR"). *See* Iran.Resp. 20. Under 28 U.S.C. § 1609, FSIA immunity exceptions are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment." *Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192, 195 (D.D.C. 2015). "[P]roperty exempt under the VCDR is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611." *Id.* Finally, as petitioners explained previously, Pet. 13, 30, and as this Court observed in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016), section 1610(g) does not take precedence over other laws. Therefore, where some other basis for immunity lies, execution may be prohibited even if otherwise permitted under § 1610(g). *See, e.g., Harrison v. Republic of Sudan*, 838

F.3d 86, 98 (2d Cir. 2016) (§ 1610(g) does not override limitations on execution against blocked assets).

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF SECTION 1610(a) IS WRONG AND WARRANTS REVIEW.

1. The Seventh Circuit's construction of § 1610(a) presents an important question of federal law that, even in the absence of an ***express*** circuit split, warrants immediate review. Pet. 36-38. The court below misstated decisions of three other courts of appeals and declared a false "consensus" supporting its own interpretation of § 1610(a). Pet. 36-38. Rather than engaging the facts of these putative "precedents," Iran quotes excerpts divorced from context, cites the Seventh Circuit's decision as authority for itself, and repeats the *mantra* that "as the Seventh Circuit noted, every circuit to have addressed the issue has agreed with its interpretation." Iran.Resp. 21. The fact remains that none of the "precedents" addressed the question of third-party use of property owned by a foreign sovereign.

2. The Seventh Circuit's holding that section 1610(a) allows execution only where the foreign state itself uses its property for commercial activity flatly defies the statutory text. Section 1610(a) does not specify whether a particular party must use the property; it merely specifies that the property must be "used." In *Dean v. United States*, 556 U.S. 568, 572 (2009), the

Court held that this form of statutory construct "focuses on an event that occurs without respect to a specific actor. . . ." *Id. See also, Harrison v. Republic of Sudan*, 838 F.3d 86, 91 (2d Cir. 2016) (applying *Dean* to hold the FSIA does not require that service of process be made *in the foreign county* where the statute does not provide explicitly). Applying the rule of *Dean* to § 1610(a), use by ***anyone*** triggers the immunity exception. Rather than following *Dean*, to preempt ambiguity, the Seventh Circuit rejected *Dean* and construed the passive voice as creating ambiguity.

3. Having created ambiguity, the Seventh Circuit referred to the statutory findings and declaration of purpose of § 1602. This Court has held that § 1602 describes the two purposes of the FSIA as (a) codifying the restrictive theory of sovereign immunity, and (2) transferring primary responsibility for deciding claims of immunity from the State Department to the courts. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). As discussed in the petition, and contrary to *Samantar*, the Seventh Circuit selectively italicized the words in § 1602 and based upon that emphasis, concluded that the purpose of the FSIA was to ensure a foreign sovereign's property loses immunity only when the foreign sovereign itself uses the property for commercial activity. App. 17-18. The University argues that this "purpose" is "the core principle of the FSIA." Univ.Opp. 19. Iran claims that the "petitioners' construction of § 1610(a) puts the provision at war with the statute's explicitly stated purpose." Iran.Resp. 23.

On the contrary, the Seventh Circuit's construction of § 1610(a) puts it "at war" with the statutory text, which plainly states that ***anyone's*** use of foreign state property for a commercial activity establishes the immunity exception of § 1610(a). The Seventh Circuit's construction is also "at war" with numerous Supreme Court precedents, as well as the Ninth Circuit's *en banc* decision in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), and the Second Circuit's decision in *Harrison*, 838 F.3d at 91, *supra*, 11. Pet. 6-8, 33-35. Specifically, the Seventh Circuit's decision is methodologically in conflict with *Dean*, *Cassirer*, and *Harrison*. Against this backdrop, the Court should review *Rubin's* construction of § 1610(a), and prevent it from establishing a "consensus" that is "at war" with the text of the statute and numerous decisions of this Court and others.

4. Iran refers to 28 U.S.C. § 1605(a)(2) which provides that under one jurisdictional immunity exception, the commercial activity must be carried on "by the foreign state." Resp. 24. Iran argues that the specificity of § 1605(a)(2) should be read into § 1610(a). But the contrast cuts the other way. Congress conspicuously omitted this restrictive language in § 1610(a). And, this omission demonstrates Congress's intent to allow attachment of a foreign state's property regardless of who uses it for commercial activity. Even if executional immunity exceptions tend to be more limited than jurisdictional immunity exceptions, that *trend* cannot be used to alter statutory language. Moreover, historical,

pre-FSIA jurisprudence does not trump express statutory provisions.

Finally, Iran relies upon the Seventh Circuit's "skepticism" that the museums' use of the Artifacts constitutes "commercial activity." Resp. 25-6. However, like the Seventh Circuit, Iran fails to consider this Court's holding in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) or its progeny. *Weltover* instructed: "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 504 U.S. at 614. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) held, "There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." Finally, *Sun v. Taiwan*, 201 F.3d 1105, 1108-09 (9th Cir. 2000) held that "a non-profit cultural tour to foster ties with individuals of Chinese descent overseas and promote understanding of Chinese culture" conducted by Taiwan, and the "compilation of a comprehensive linguistic treatise" by the Australian government, were commercial activities under the FSIA, because they are the types of activities sometimes performed by non-sovereigns).

CONCLUSION

The petition should be granted.

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RECORD AND BRIEF

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In the Supreme Court of the United States

JENNY RUBIN, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, the property of a foreign state and its agencies or instrumentalities is generally immune from attachment or execution, except as provided in 28 U.S.C. 1610 and 1611. Section 1610(a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune in certain circumstances. 28 U.S.C. 1610(a). And Section 1610(g) provides that the property of a foreign state against which a judgment is rendered in certain terrorism-related cases, and the property of its agencies or instrumentalities, is subject to attachment "as provided in this section," regardless of five factors. 28 U.S.C. 1610(g)(1). The questions presented are:

1. Whether 28 U.S.C. 1610(g) creates a freestanding exception to attachment immunity, or instead simply abrogates distinctions between a foreign state and its agencies and instrumentalities for purposes of attachment, while still requiring a judgment creditor to proceed "as provided in this section," such as under 28 U.S.C. 1610(a).

2. Whether the commercial-activity exception to execution immunity in 28 U.S.C. 1610(a) applies only when the foreign state itself (rather than a third party) has used the property in commercial activity.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 9
I. This Court should grant review to consider whether Section 1610(g) creates a freestanding exception to attachment immunity 10
A. The decision below correctly interprets Section 1610(g) 10
B. The decision below conflicts with *Bennett* 13
C. The question presented is important 15
D. The Court should grant this petition and hold the *Bennett* petition 16
II. This Court should not grant review to consider whether a third party's activity can satisfy the commercial-activity requirement in Section 1610(a) 18
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Abbott v. *Veasey*, 137 S. Ct. 612 (2017) 17
Acosta v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008) 18
Af-Cap Inc. v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007) 21
Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 20
Aurelius Capital Partners, LP v. *Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009), cert. denied, 559 U.S. 988 (2010) 21

Cases—Continued: Page

Bennett v. *Islamic Republic of Iran*:
507 F. Supp. 2d 117 (D.D.C. 2007) 18
825 F.3d 949 (9th Cir. 2016) ..... *passim*
Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), cert. denied, 564 U.S. 1037 (2011) 21, 22
Connecticut Bank of Commerce v. *Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) 21
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) 19
Dean v. *United States*, 556 U.S. 568 (2009) 21, 22
Estate of Heiser v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20 (D.D.C. 2009) 18
First Nat'l City Bank v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 4
Gates v. *Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014) 8
Greenbaum v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006) 18
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 17
Harrison v. *Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422 (S.D.N.Y. Feb. 10, 2017) 16
Kirschenbaum v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107 (2d Cir. 2016), cert. denied, 137 S. Ct. 1332 (2017) 13
Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. *Elahi*, 556 U.S. 366 (2009) 14
NLRB v. *SW Gen., Inc.*, 137 S. Ct. 929 (2017) 11
Operating Eng'rs Pension Trust v. *Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301 (9th Cir. 1985) 14
Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 20

Cases—Continued: Page

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 20
Roberts v. *Sea-Land Servs., Inc.*, 566 U.S. 93 (2012) 19
Taylor v. *Standard Gas Co.*, 306 U.S. 307 (1939).....4
Walter Fuller Aircraft Sales, Inc. v. *Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992) 4
Weinstein v. *Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016) 13
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) 14
Wyatt v. *Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015), cert. denied, 136 S. Ct. 1721 (2016) 8

Treaty and statutes:

Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224.....16
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241 3
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 1
28 U.S.C. 1603(a).....2
28 U.S.C. 1605(a)(2) 21
28 U.S.C. 1605(a)(3) 21
28 U.S.C. 1605(a)(7) (2006).....3
28 U.S.C. 1605(a)(7) 2, 3, 12, 13
28 U.S.C. 1605A.....*passim*
28 U.S.C. 1609.....2
28 U.S.C. 1610.....*passim*
28 U.S.C. 1610(a) 2, 7, 9, 18, 19
28 U.S.C. 1610(a)(7) 2, 3, 12
28 U.S.C. 1610(b).....2
28 U.S.C. 1610(b)(3) 2, 3
28 U.S.C. 1610(f) 5
28 U.S.C. 1610(f)(1) 5

Statutes—Continued: Page

28 U.S.C. 1610(f)(2) 5, 12
28 U.S.C. 1610(f)(3) 5
28 U.S.C. 1610(g) ..... *passim*
28 U.S.C. 1610(g)(1) 4, 10
28 U.S.C. 1611 2
International Emergency Economic Powers Act, 50 U.S.C. 1701-1702 6
Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260 13
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:
§ 1083(a)(1), 122 Stat. 338 3
§ 1083(b)(1), 122 Stat. 339 3
§ 1083(b)(3)(A), 122 Stat. 341 ..... 12, 13
§ 1083(b)(3)(D), 122 Stat. 341 ..... 3, 12
§ 1083(c)(2), 122 Stat. 342-343 3
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322:
§ 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note) 5, 7, 14
§ 201(d)(2), 116 Stat. 2339 ..... 6, 16
§ 201(d)(4), 116 Stat. 2340 6
Trading with the Enemy Act, 50 U.S.C. 4301 *et seq.* 6

Miscellaneous:

63 Fed. Reg. 53,201 (Oct. 21, 1998) 5
65 Fed. Reg. 66,483 (Oct. 28, 2000) 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented by the petition.

STATEMENT

Petitioners are seeking to enforce a money judgment against respondent Islamic Republic of Iran by attaching artifacts that Iran owns and that respondent University of Chicago possesses. The district court granted summary judgment to respondents, holding that the property was immune from attachment and execution under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* Pet. App. 44. The court of appeals affirmed. *Id.* at 1-38.

1. The FSIA provides that, subject to certain international agreements, the property in the United States of a foreign state, and its agencies or instrumentalities, "shall be immune from attachment arrest and execution," except as provided in 28 U.S.C. 1610 and 1611. 28 U.S.C. 1609; see 28 U.S.C. 1603(a) (defining "foreign state"). Section 1611 is not at issue here.

a. Subsections (a) and (b) of Section 1610 create exceptions for property with a commercial nexus. Subsection (a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune from attachment if additional criteria are satisfied. 28 U.S.C. 1610(a).[1] Subsection (b) creates an additional exception for the property of an agency or instrumentality. 28 U.S.C. 1610(b). Unlike property covered by subsection (a)—which must *itself* be used in commercial activity—subsection (b) abrogates attachment immunity for any property "of an agency or instrumentality" if the agency or instrumentality is "engaged in commercial activity in the United States" and additional criteria are satisfied. *Ibid.*

Pursuant to the additional criteria in both provisions, property with the requisite commercial nexus is not immune from attachment if (among other things) the judgment that the plaintiff is seeking to enforce relates to a claim for which the entity "is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7); see 28 U.S.C. 1610(b)(3) (similar). The referenced provisions are known as the "terrorism exception" to a foreign sovereign's immunity to suit.

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[1] This brief uses the term "attachment" to refer to attachment, arrest, and execution.

The terrorism exception was originally codified at 28 U.S.C. 1605(a)(7). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241. Section 1605(a)(7) provided that designated state sponsors of terrorism would not be immune from suits seeking money damages for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such acts. 28 U.S.C. 1605(a)(7) (2006). On January 28, 2008, Congress repealed that provision and replaced it with 28 U.S.C. 1605A. See National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a)(1) and (b)(1), 122 Stat. 338-341. Among other things, Section 1605A expressly creates a private right of action for certain injuries caused by designated state sponsors of terrorism. 28 U.S.C. 1605A.[2]

Accordingly, if a party obtains a money judgment under the current or former terrorism exception, that judgment creditor may be able to enforce the judgment by attaching property with the requisite commercial nexus under 28 U.S.C. 1610(a)(7) or (b)(3).

b. When Congress updated the terrorism exception in 2008, it also added subsection (g) to 28 U.S.C. 1610. NDAA § 1083(b)(3)(D), 122 Stat. 341-342. Subsection (g) provides:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical

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[2] The statute allowed plaintiffs with pending cases under Section 1605(a)(7) to convert their actions, in certain circumstances, to suits under Section 1605A. NDAA § 1083(c)(2), 122 Stat. 342-343.

> entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of [five specified factors].

28 U.S.C. 1610(g)(1) (emphasis added).

The five factors listed in subsection (g)(1) almost perfectly parallel the factors that some courts have considered when a party seeks to satisfy a judgment against a foreign state by attaching property belonging not to the state itself, but to an agency or instrumentality. In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), this Court recognized a general presumption that courts should respect the separate legal status of a state's agencies and instrumentalities. *Id.* at 626-628. A foreign state's judgment creditor therefore generally cannot satisfy that judgment by attaching the property of an agency or instrumentality. That presumption may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created," or if recognizing the entity's separate juridical status would "'work fraud or injustice.'" *Id.* at 629 (quoting *Taylor* v. *Standard Gas Co.*, 306 U.S. 307, 322 (1939)); see *id.* at 633. Some courts have identified "*Bancec* factors" to consider in making that determination. Pet. App. 23-26; see, *e.g.*, *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Subsection (g) thus establishes that courts need not engage in a *Bancec* analysis in enforcement proceedings in covered terrorism cases. See Pet. App. 26.

c. Subsection (f) of Section 1610 creates a mechanism for attaching property in certain terrorism cases, but that mechanism has never been operative. 28 U.S.C. 1610(f). Paragraph (f)(1) provides that certain assets blocked under various sanctions programs are subject to attachment or execution "of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune" under the terrorism exception. 28 U.S.C. 1610(f)(1). Paragraph (f)(2) provides that the State and Treasury Departments "should make every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2). Paragraph (f)(3) provides, however, that the President may waive "any provision of paragraph (1) in the interest of national security." 28 U.S.C. 1610(f)(3). Invoking that authority, the President waived paragraph (f)(1) before it ever went into effect. See 65 Fed. Reg. 66,483 (Oct. 28, 2000); see also 63 Fed. Reg. 59,201 (Oct. 21, 1998) (superseded waiver of predecessor statute).

2. One additional provision is relevant to understanding the context of this case: The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note), permits attachment of certain blocked assets in terrorism cases. It provides that "[n]otwithstanding any other provision of law," a person who has obtained a judgment against a "terrorist party" under the terrorism exception may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)" to the extent of any compensatory damages. *Ibid.* The term "terrorist party" includes a designated state sponsor of terrorism.

§ 201(d)(4), 116 Stat. 2340. TRIA defines "blocked assets" to include assets "seized or frozen by the United States" under the Trading with the Enemy Act, 50 U.S.C. 4301 *et seq.*, or the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1702. TRIA § 201(d)(2), 116 Stat. 2338-2339. When applicable, TRIA thus authorizes attachment of the blocked assets of a foreign state or its agencies or instrumentalities, without regard to *Bancec* and without requiring a nexus to commercial activity.

3. a. Petitioners hold a $71.5 million judgment against Iran arising out of Iran's role in a 1997 terrorist attack. Pet. App. 1-2. They obtained the judgment under the original version of the terrorism exception, then converted it to a judgment under Section 1605A. *Id.* at 5-6 & n.1. Petitioners registered their judgment in the Northern District of Illinois and sought to attach the Persepolis Collection, a collection of ancient Persian artifacts. *Id.* at 2-3.[3] The collection is owned by Iran but has been on loan to the University since 1937 for research, translation, and cataloging. *Id.* at 4-5, 46.

The district court granted summary judgment to respondents, holding that the collection is immune from attachment under the FSIA. Pet. App. 43-71. First, the court held that the commercial-activity exception in subsection (a) of Section 1610 is inapplicable because it applies only when the foreign state uses the property for commercial activity, and there was no indication that Iran had so used the Persepolis Collection. *Id.* at 50-57.

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[3] Petitioners also sought to attach other Iranian artifacts in the University's possession, as well as artifacts possessed by another institution, but the Persepolis Collection is the only property still at issue. See Pet. App. 2-3, 8-10.

Second, the court held that subsection (g) does not apply, because it is not a freestanding immunity exception. *Id.* at 57-62. Rather, the court concluded, it permits attachment only "*as provided in this section*," and no other provision in Section 1610 applies. *Id.* at 61. Third, the court held that TRIA § 201(a) does not authorize attachment, because the Persepolis Collection is not a "blocked" asset for purposes of TRIA. Pet. App. 67.

b. The court of appeals affirmed. Pet. App. 1-38. The court agreed with the district court (and with the United States as amicus curiae) that Section 1610(a) does not apply because it reaches only property used in commercial activity by the foreign state itself, not by a third party. The court explained that subsection (a) is ambiguous because it uses the passive voice (property "used for commercial activity"). *Id.* at 16-17. The court concluded, however, that the FSIA's statutory declaration of purpose, particularly when read in light of background norms of international law, confirms that the district court's interpretation is correct. *Id.* at 17-21.

The court of appeals also agreed with the district court (and the United States) that subsection (g) of Section 1610 does not provide a basis for attachment of the artifacts because it is not a freestanding immunity exception and no other provision of Section 1610 provides for attachment. Pet. App. 21-35. The court explained that subsection (g)'s phrase "as provided in this section" means that an individual must first show that an immunity exception elsewhere in Section 1610 applies. *Ibid.* Otherwise, the court explained, it would be superfluous for subsections (a)(7) and (b)(3) of Section 1610 to refer to Section 1605A, because any person with a Section 1605A judgment could already proceed under

subsection (g), without satisfying the additional commercial-activity requirements in subsections (a)(7) and (b)(3). *Id.* at 27-28.

The court of appeals recognized that the Ninth Circuit had reached the opposite conclusion in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016). Pet. App. 34. But the court found *Bennett* unpersuasive. See *ibid.* ("[W]e disagree with the Ninth Circuit's interpretation of subsection (g).").

The court of appeals noted that the Ninth Circuit had relied on statements in two earlier Seventh Circuit decisions, *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 342-343 (2015), cert. denied, 136 S. Ct. 1721 (2016), and *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (2014). See Pet. App. 34. The court explained that those statements were merely dicta. *Id.* at 31. The court nonetheless overruled *Gates* and *Wyatt* to the extent they could "be read as holding that § 1610(g) is a free-standing exception." *Id.* at 34-35. The panel stated that its decision had been circulated to all Seventh Circuit judges in active service, that five judges were recused, and that a majority had not voted to rehear the case en banc. *Id.* at 35 n.6. Judge Hamilton (the author of *Gates* and *Wyatt*) filed a dissent from denial of rehearing en banc. *Id.* at 39-42. In his view, Section 1610(g) is ambiguous, and he would have resolved that ambiguity by favoring victims of terrorism. *Ibid.*

Finally, the court of appeals held that petitioners could not attach the Persepolis Collection under TRIA because it was not "blocked." Pet. App. 35-38. Petitioners do not seek review of that determination.

DISCUSSION

The petition for a writ of certiorari should be granted, limited to the first question presented. As the court of appeals acknowledged, its interpretation of Section 1610(g) is contrary to *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016), which found Section 1610(g) to be a freestanding exception to attachment immunity under the FSIA. The Ninth Circuit's decision in *Bennett* is wrong, for essentially the reasons stated in the Seventh Circuit's decision below, and the proper resolution of this question is important. Although the United States sympathizes with petitioners and other victims of terrorism, the seizure of a foreign sovereign's property via attachment or execution can affect the United States' foreign relations. The United States therefore has a strong interest in the proper interpretation and application of the FSIA's rules governing judicial seizure of foreign state property in the United States.

This case is a better vehicle than *Bennett* for answering the subsection (g) question. This case arises on an appeal from a final judgment, whereas *Bennett* is an interlocutory order. And particularly if the Court grants review solely on the first question presented in this case, as the United States recommends, the attachment here would stand or fall on the interpretation of subsection (g). By contrast, *Bennett* includes several complicating factors, and the proper interpretation of subsection (g) may ultimately be immaterial.

Review is not warranted on the second question presented. As the court of appeals correctly understood, Section 1610(a) applies when the foreign state uses the targeted property in commercial activity, not when a

third party does. Every other court of appeals to consider the issue has reached the same result. This would also be a poor vehicle for addressing that question, because it is uncertain whether the University has used the Persepolis Collection in commercial activity.

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER SECTION 1610(g) CREATES A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY

A. The Decision Below Correctly Interprets Section 1610(g)

1. Subsection (g) provides that "the property of a foreign state" against which a judgment has been entered under Section 1605A, "and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly" in such an entity, "is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of" the *Bancec* factors discussed above. 28 U.S.C. 1610(g)(1) (emphasis added); Pet. App. 25-26. Subsection (g) thus sets aside the need for a *Bancec* inquiry in certain cases involving the terrorism exception. When a plaintiff obtains a Section 1605A judgment, the plaintiff can attempt to execute against the property of the foreign state itself or an agency or instrumentality, without regard to the *Bancec* factors. That significantly expands the universe of assets potentially available in such cases. But by its terms, the plaintiff still must proceed "as provided in this section." *Ibid.* That is, the creditor must also satisfy one of the exceptions to attachment immunity "as provided in" Section 1610. Congress thus did not take the further step of creating a freestanding exception to attachment immunity that

would override the carefully crafted exceptions to immunity elsewhere in Section 1610. Pet. App. 26-27.

2. The Ninth Circuit's alternative view would render much of the relevant provisions insignificant or superfluous.

a. First, subsection (g)'s statement that property may be attached "as provided in this section" would be essentially meaningless, because the statute would function the same way with or without it. The Ninth Circuit appeared to recognize that the phrase must refer to some other part of Section 1610, and concluded that it "refer[s] to procedures contained in § 1610(f)." *Bennett*, 825 F.3d at 959. But as the court of appeals explained, "it would be very odd" for Congress to refer to subsection (f) in that way. Pet. App. 27. Congress would not be expected to say "this section" when it really meant "the preceding subsection." Cf. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017).

Moreover, even on its own terms, the Ninth Circuit's interpretation would not support attachment. Paragraph (f)(1) could theoretically allow the attachment of certain blocked assets—but the President exercised his statutory authority to waive paragraph (f)(1) before it went into effect. See Pet. App. 33-34. Subsection (f) thus has been "inoperative from the start," and "does not allow *any* form of execution." *Id.* at 34. Accordingly, if subsection (g) referred solely to subsection (f), it "would mean no execution at all." *Ibid.*[4]

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[4] The Ninth Circuit noted that paragraph (f)(2) has not been waived. See *Bennett*, 825 F.3d at 959-960 & n.5. But that paragraph does not save the Ninth Circuit's interpretation, because it does not provide for attachment (or even create procedures for attachment); it provides that the State and Treasury Departments "should make

b. Second, the Ninth Circuit's interpretation of subsection (g) would render subsection (a)(7) largely irrelevant. See Pet. App. 27-28. Subsection (a)(7) provides that a foreign state's property used in commercial activity is not immune from attachment if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7). Section 1605A is the current version of the terrorism exception. See p. 3, *supra*. Subsections (a)(7) and (g) thus work together to enable holders of terrorism-related judgments to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or by its agencies or instrumentalities, without need for a *Bancec* inquiry (via subsection (g)).

The Ninth Circuit's interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling Section 1605A creditors to evade subsection (a)(7)'s key limitation. Subsection (a)(7) allows a Section 1605A judgment creditor to pursue property only if it is used in commercial activity—but those same creditors could pursue property without that limitation simply by invoking subsection (g). For those creditors, subsection (a)(7) and its limitations would be superfluous.

Even worse, the Ninth Circuit's interpretation would have made subsection (a)(7) entirely irrelevant when it was adopted. The very same statute—the 2008 NDAA—both amended subsection (a)(7) to refer to Section 1605A and enacted subsection (g). NDAA § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7)

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every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2).

referred *solely* to judgment creditors under Section 1605A. § 1083(b)(3)(A), 122 Stat. 341.[5] Thus, under the Ninth Circuit's interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely pointless —even though Congress was making substantive changes to subsection (a)(7) at the very same time.

B. The Decision Below Conflicts With *Bennett*

1. The court of appeals' decision here conflicts with *Bennett*. In *Bennett*, the Ninth Circuit held that subsection (g) "contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." 825 F.3d at 959. On that view, persons with a judgment against a foreign state under Section 1605A need not demonstrate any nexus between the property of the foreign state (or its agency or instrumentality) and commercial activity before proceeding to execution. The court of appeals reached the opposite result here, while acknowledging the split in authority. Pet. App. 34 ("[W]e disagree with the Ninth Circuit's interpretation of subsection (g)."). And respondent Iran, owner of the artifacts at issue, acknowledges the split as well and agrees that the question warrants certiorari. Iran Mem. in Response 14-17.[6]

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[5] Congress only later restored the reference to the prior version of the terrorism exception, Section 1605(a)(7). See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260.

[6] Petitioners and Iran contend that the Second Circuit and D.C. Circuit have also decided the issue. See Pet. 22; Iran Mem. in Response 15. In *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 482-484 (2016), the D.C. Circuit treated subsection (g) as a standalone exception, but without analysis. In *Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2016), the Second Circuit described subsection (g) as a standalone exception, without

The University nonetheless asserts (Br. in Opp. 10-11) that there is no conflict because *Bennett*'s interpretation of subsection (g) was an "alternative ground for the holding"; the Ninth Circuit also found the assets in that case to be attachable under TRIA. An alternative holding is still binding precedent, however, not dicta. See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Operating Eng'rs Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985). Moreover, *Bennett*'s Section 1610(g) analysis—which prompted a dissent solely on that issue, see 825 F.3d at 966-970 (Benson, J., concurring in part and dissenting in part)—gave the Ninth Circuit's judgment a broader scope: It permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g). TRIA permits creditors to recover only up to the amount of their compensatory damages, see § 201(a), 116 Stat. 2337, and only so long as the relevant assets remain "blocked," see *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 369 (2009). Section 1610(g) contains neither limitation. Accordingly, there is a direct conflict on this question.[7]

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analysis, but held that the property was not subject to attachment on other grounds.

[7] The respondents in *Bennett* contend (Br. in Opp. at 19-20, *Bennett*, *supra* (No. 16-334)) that there is no direct conflict because that case involved blocked assets, whereas this case does not, and they argue that paragraph (g)(2) supports this distinction. The University makes no such argument here, and in any event the Ninth Circuit's broad holding forecloses it because there is no suggestion that its interpretation of the reach of subsection (g) is applicable only to blocked assets. See *Bennett*, 825 F.3d at 959 ("We hold that subsection (g) contains a freestanding provision for attaching and execut-

Unless this Court intervenes, the circuit conflict will likely persist. The Ninth Circuit denied en banc review in *Bennett*, even after soliciting (and receiving) from the United States an amicus brief arguing that the panel's interpretation of Section 1610(g) was wrong. 825 F.3d at 954. And although the Ninth Circuit denied rehearing en banc before the Seventh Circuit decided this case and created the circuit conflict, the Seventh Circuit's analysis was similar to the analysis the parties and the United States had already presented to the Ninth Circuit in *Bennett*. It is therefore unlikely that the Ninth Circuit would grant en banc review in a future case to adopt the Seventh Circuit's position.

The Seventh Circuit also declined to grant en banc review here. Pet. App. 35 n.6. This case had the unusual circumstance that a majority of the en banc court was recused, but only one non-recused judge, Judge Hamilton, registered the view that en banc review was appropriate. *Ibid.* It is thus unlikely that the Seventh Circuit would grant en banc review in a future case to adopt the Ninth Circuit's position that the panel squared rejected.

C. The Question Presented Is Important

The meaning of Section 1610(g) is a pure question of statutory interpretation that has divided the circuits and that implicates foreign affairs. The Ninth Circuit's interpretation of subsection (g) significantly broadens its scope by denying attachment immunity for property without any need for a nexus to commercial activity. Congress has carefully crafted exceptions in the FSIA

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ing against assets of a foreign state or its agencies or instrumentalities."). The Ninth Circuit never mentioned paragraph (g)(2). See *id.* at 954-966.

relating to state sponsors of terrorism, and they should not be subject to unwarranted judicial expansion.

The interpretation of subsection (g) may have little practical impact in many cases involving enforcement of judgments obtained under the terrorism exception, because such creditors may be able to attach blocked property under TRIA (as the individual respondents seek to do in *Bennett*), without regard to the interpretation of subsection (g). The interpretation of subsection (g) is critical, however, when the assets at issue do not meet TRIA's specialized definition of "blocked property." § 201(d)(2), 116 Stat. 2338. For example, TRIA would not govern attachment involving judgments against Sudan, because Sudan's assets are no longer blocked for purposes of TRIA, see, *e.g.*, *Harrison* v. *Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *3 (S.D.N.Y. Feb. 10, 2017), or judgments against Iran where the creditor seeks to attach assets that (like the Persepolis Collection) were unblocked by the Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224. The Ninth Circuit's rule would create an exception to immunity for all such unblocked property, even when it lacks any nexus to commercial activity.

D. The Court Should Grant This Petition And Hold The *Bennett* Petition

This case is a better vehicle than *Bennett* for this Court's plenary review. This case arises from a final judgment, and if the Court denies review on the second question presented, as we recommend, see pp. 18-22, *infra*, petitioners' ability to attach the Persepolis Collection will stand or fall on the interpretation of subsection (g). It is undisputed that the collection is Iran's property, and there would be final determinations that it is

not attachable under subsection (a)'s commercial-activity exception or under TRIA. This case also demonstrates the impact of attaching assets that the foreign sovereign has not used in commercial activity and that are not blocked, and thus are not attachable under subsection (a) or TRIA. Petitioners seek to attach what Iran describes as "irreplaceable artifacts of [its] cultural heritage," which it loaned to an American university for academic study. Iran Mem. in Response 26.

By contrast, *Bennett* presents several complicating factors. First, *Bennett* is interlocutory: The district court denied a motion to dismiss, but certified the decision for interlocutory review, and the court of appeals affirmed. 825 F.3d at 957, 966. Ordinarily, an interlocutory posture "itself alone furnishe[s] sufficient ground for the denial" of a petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Second, in part because of *Bennett*'s interlocutory posture, it is unclear whether the interpretation of subsection (g) will ultimately make a practical difference to the attachment at issue in that case. The Ninth Circuit held that the plaintiffs could attach the assets under TRIA. 825 F.3d at 957-958. And although the panel's interpretation of subsection (g) gives a broader scope to the judgment, see pp. 14-14, *supra*, as a practical matter TRIA will likely resolve the case on remand unless there is some change in circumstances. For subsection (g) to have practical importance, the disputed assets would need to become unblocked during the litigation, or the *Bennett* plaintiffs would have to find enough Iranian assets to satisfy their sizable compensatory damage awards (which dwarf the estimated $17.6 million in

property at issue in that case) and then seek to satisfy their punitive damage awards, which may be enforced under the FSIA but not TRIA.[8]

Third, the *Bennett* respondents may raise alternate grounds for affirming the Ninth Circuit's judgment. See Br. in Opp. at 22, *Bennett*, *supra* (No. 16-334) (arguing that the assets are independently attachable under subsections (a)(7) and (b)(3)); see also *Bennett*, 825 F.3d at 966-970 (Benson, J., concurring in part and dissenting in part) (concluding that the assets would be attachable by virtue of subsection (b)(3)). Those issues could be a distraction in the briefing and argument, and could interfere with the Court's ability to resolve the question on which the circuits are divided. The appropriate course is accordingly for the Court to grant the petition in this case, and to hold the petition in *Bennett* for its decision in this case.

II. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER WHETHER A THIRD PARTY'S ACTIVITY CAN SATISFY THE COMMERCIAL-ACTIVITY REQUIREMENT IN SECTION 1610(a)

This Court should limit its review of this case to the first question presented because the second question does not warrant further review. The court of appeals correctly held that Section 1610(a) does not apply here. That holding does not conflict with any decision of this

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[8] The compensatory awards were about $290 million for the *Heiser* plaintiffs, $85 million for the *Acosta* plaintiffs, $12.5 million for the *Bennett* plaintiffs, and $20 million for the *Greenbaum* plaintiffs. See *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20, 23, 31 (D.D.C. 2009); *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15, 31 (D.D.C. 2008); *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117, 130 (D.D.C. 2007); *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90, 105, 108 (D.D.C. 2006).

Court or another court of appeals, and in any event this case would be a poor vehicle for reviewing that question.

A. The court of appeals correctly held that subsection (a) does not permit attachment of the Persepolis Collection because Iran has never "used [that property] for a commercial activity in the United States," 28 U.S.C. 1610(a), and "foreign states may lose execution immunity" under subsection (a) "only by virtue of *their own* commercial use of their property in the United States, not a third party's." Pet. App. 18.

Subsection (a) applies to "[t]he property in the United States of a foreign state, * * * used for a commercial activity in the United States." 28 U.S.C. 1610(a). Because subsection (a) is phrased in the passive voice—"used for a commercial activity," *ibid.*—it is ambiguous standing alone whether the exception is satisfied only when the foreign state itself uses that property in commercial activity, or whether it could also apply when someone else does. See Pet. App. 16-17. To resolve that ambiguity, the statute's words "must be read in their context and with a view to their place in the overall statutory scheme." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). And as the court of appeals correctly explained, the statutory context confirms that only the foreign state's own commercial activity qualifies.

When enacting the FSIA, Congress codified its "[f]indings and declaration of purpose" in 28 U.S.C. 1602. Section 1602 reflects that Congress sought to conform to its understanding of foreign sovereign immunity in international law, under which "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their*

commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." *Ibid.* (emphases added). Congress's repeated use of "their" indicates that Congress intended that foreign sovereigns themselves (not third parties) must be engaged in the commercial activities that could abrogate immunity.

This understanding is also consistent with the "restrictive theory" of foreign sovereign immunity, which the FSIA has generally been understood to codify. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690-691 (2004). Under that theory, a foreign sovereign enjoys immunity for its sovereign or public acts, but not with regard to private acts like commercial activity. The theory is based in part on the idea that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-704 (1976) (opinion on White, J.). But when the only commercial activity is by a third party, not the foreign government, that logic ceases to hold.

A contrary reading also would conflict with the ordinary rule that the FSIA's "exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity." Pet. App. 20; see *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). That is because "[s]eizing a foreign state's property" is recognized as a more serious affront to its sovereignty than "taking jurisdiction in a lawsuit." Pet. App. 20. Petitioners' interpretation of subsection (a), however, would "turn[] this important principle on its head" because a foreign state cannot

lose its immunity to suit based on the commercial activities of a third party. *Ibid.*; see 28 U.S.C. 1605(a)(2) (allowing suit where, *inter alia*, the action is "based upon a commercial activity carried on * * * by the foreign state," or certain acts "in connection with a commercial activity of a foreign state").

B. The court of appeals' interpretation of subsection (a) is consistent with the decisions of every court of appeals to consider the issue. See *Aurelius Capital Partners LP* v. *Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009), cert. denied, 559 U.S. 988 (2010); *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002).

Contrary to petitioners' suggestion (Pet. 33-35), the court of appeals' decision here does not conflict with *Dean* v. *United States*, 556 U.S. 568 (2009), or *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), cert. denied, 564 U.S. 1037 (2011), because those cases involved different statutes with different text and context. *Dean* held that a sentencing enhancement for firearms cases where "the firearm is discharged" applied regardless of whether the defendant intended to discharge it. 556 U.S. at 571-572. *Cassirer* interpreted 28 U.S.C. 1605(a)(3), which provides an exception to a foreign sovereign's immunity to suit where "rights in property taken in violation of international law are in issue" and there is a commercial activity nexus to the United States. *Ibid.* The court concluded that Section 1605(a)(3) can be satisfied in a case against a foreign sovereign that held the property at the time of suit and engaged in commercial activities in the United States related to the property, even if another foreign sovereign improperly took the property. *Cassirer*, 616 F.3d

at 1028-1032. Accordingly, neither case decided the question here.

Furthermore, although both decisions found support in the statutes' use of the passive voice, see *Dean*, 556 U.S. at 571; *Cassirer*, 616 F.3d at 1028, neither announced an across-the-board rule that the passive voice always means that the identity of the actor is irrelevant, without regard to a particular statute's context or purpose. Indeed, the Ninth Circuit emphasized in *Cassirer* that its interpretation was consistent with the FSIA's animating principle of denying states immunity when they engage in their own commercial activity. 616 F.3d at 1030. By contrast, petitioners' interpretation of subsection (a) is in tension with that principle.

C. This case also would be a poor vehicle for reviewing the question. The court of appeals expressed "skeptic[ism] that academic study" of artifacts by the University would even qualify as "commercial activity," Pet. App. 16, and Iran has indicated it believes that no party has ever used the artifacts in commercial activity, Iran Mem. in Response 25-26. The United States takes no position on this issue, and the court of appeals did not address it. But the possibility that subsection (a) may be inapplicable, regardless of how it is interpreted, makes this a poor vehicle for this Court to interpret it.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610.

PARTIES TO THE PROCEEDING

The Petitioners were judgment creditors in the Northern District of Illinois seeking to enforce a judgment previously entered in the District Court for the District of Columbia. They were the appellants in the court of appeals.

Respondent, Islamic Republic of Iran, was the judgment debtor in the district court and the appellee in the court of appeals.

Respondents, Field Museum of Natural History and University of Chicago, Oriental Institute, were respondents to the judgment creditors' citations to discover assets in the district court, and appellees in the court of appeals. However, the Field Museum has no interest in the outcome of proceedings in this Court.

The United States is not a party to this action. However, it appeared in the district court to file statements of interest pursuant to 28 U.S.C. § 517, and in the court of appeals to file an *amicus* brief and present oral argument supporting the position of the appellees.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
BRIEF OF PETITIONER	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
A. Statutory Framework	5
B. Factual Background	18
SUMMARY OF THE ARGUMENT	24
ARGUMENT	26
A. Introduction	26
I. The text of subsection 1610(g) compels an expansive construction that is not limited by other provisions within § 1610	30
A. The Seventh Circuit's construction renders subsection 1610(g) a self-contradictory, self-defeating provision that could almost never be applied	30
B. A broad construction of subsection 1610(g) would not render other provisions superfluous	40

TABLE OF CONTENTS – Continued

Page

C. Subsection (g)'s reference to "this Section" does not require the satisfaction of the requirements of subsections (a) or (b) 44

II. Any uncertainty as to the meaning of subsection 1610(g) should be resolved by giving effect to the clear legislative purpose behind § 1083 of the NDAA of 2008 49

A. Deterring terrorism and providing relief to its victims outweigh considerations of grace and comity as to state sponsors of terrorism, which do not deserve such solicitude 49

B. Section 1083 of the NDAA of 2008 manifests a clear legislative intent to enable terrorism victims to enforce their terrorism judgments to the fullest extent 56

C. The Seventh Circuit's construction of subsection 1610(g) as requiring satisfaction of strict commercial use requirements is not consistent with Congress's clear intent to expand the possibilities for enforcement of terrorism Judgments 58

CONCLUSION 61

TABLE OF CONTENTS – Continued

Page

APPENDIX

Foreign Sovereign Immunities Act ..... App. 1

National Defense Authorization Act for Fiscal Year 2008, section 1083 ..... App. 36

National Defense Authorization Act for Fiscal Year 2008, H.R. Engrossed Senate Amendment, Oct. 1, 2007, section 1087 ..... App. 52

TABLE OF AUTHORITIES

Page

CASES

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) 42

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007) 8

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1994) 49, 50, 51, 52

Aurelius Capital Partners v. Republic of Argentina, 582 F.3d 120 (2d Cir. 2009) 8

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) ..... *passim*

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 29

Bennett v. Islamic Republic of Iran, 799 F.3d 1281 (9th Cir. 2015) 17

Bennett v. Islamic Republic of Iran, 817 F.3d 1131 (9th Cir. 2016) 17

Bennett v. Islamic Republic of Iran, 825 F.3d 950 (9th Cir. 2016) ..... *passim*

Bernstein v. N.V. Nderlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) 51, 53

Campuzano/Rubin v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003) 18, 19

Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994) 10

TABLE OF AUTHORITIES – Continued

Page

Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002) 7, 59

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) 6

Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9 (D.D.C. 2011) ..... *passim*

Exp.-Import Bank of the Republic of China v. Grenada, 768 F.3d 75 (2d Cir. 2014) 11

First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) ("*Bancec*") ..... *passim*

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 2009) 54

Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014) ..... *passim*

Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044 (D.C. Cir. 2014) 12

Harrison v. Republic of Sudan, 838 F.3d 86 (2d Cir. 2016) 27, 53

In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31 (D.D.C. 2009) ..... *passim*

Kirschenbaum v. 650 Fifth Avenue, 830 F.3d 107 (2d Cir. 2016) 27, 31

Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym, 814 F.3d 1053 (9th Cir. 2016) 60

TABLE OF AUTHORITIES – Continued

Page

Ministry of Defense & Support for the Armed Forces v. Cubic Def. Sys., 984 F. Supp. 2d 1070 (S.D. Cal. 2013) 32, 54, 60

Peterson v. Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2010) 27, 31

Republic of Argentina v. NML Capital, Ltd., 573 U.S. ___, 134 S. Ct. 2250 (2014) 5, 7

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 6

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 15

Republic of Iraq v. Beaty, 556 U.S. 848 (2009) 42

Rubin v. Islamic Republic of Iran, 33 F. Supp. 3d 1003 (N.D. Ill. 2014) 1

Rubin v. Islamic Republic of Iran, 563 F. Supp. 2d 38 (D.D.C. 2008) 20

Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016) 1, 27

Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) 41

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 36

United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013) 54

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 5, 6, 49, 50

TABLE OF AUTHORITIES – Continued

Page

Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) 51

Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.C. Cir. 2016) ..... *passim*

Wyatt v. Syrian Arab Republic, 2015 U.S. Dist. LEXIS 46525 (D.D.C. 2015) 23

Wyatt v. Syrian Arab Republic, 800 F.3d 331 (7th Cir. 2015) 17, 27

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007) 29

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1604 6

28 U.S.C. § 1605(a)(7) ..... *passim*

28 U.S.C. § 1605A ..... *passim*

28 U.S.C. § 1605A(a)(2) 15

28 U.S.C. § 1605A(c) 15, 16, 56

28 U.S.C. § 1605A(c)(4) 48

28 U.S.C. § 1605A(d) 48, 56

28 U.S.C. § 1605A(g) 16, 48, 56

28 U.S.C. § 1605A(h)(6) 10

28 U.S.C. § 1609 6

28 U.S.C. §§ 1609-1611 7

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1610 ..... *passim*
28 U.S.C. § 1610(a) ..... *passim*
28 U.S.C. § 1610(a)(1)-(7) 31
28 U.S.C. § 1610(a)(7) ..... *passim*
28 U.S.C. § 1610(b) ..... *passim*
28 U.S.C. § 1610(b)(1)-(3) 33, 39
28 U.S.C. § 1610(b)(3) ..... *passim*
28 U.S.C. § 1610(c) 9, 39
28 U.S.C. § 1610(d) 9, 39
28 U.S.C. § 1610(e) 9, 39
28 U.S.C. § 1610(f) 9, 13, 14, 25, 39
28 U.S.C. § 1610(f)(1) ..... *passim*
28 U.S.C. § 1610(f)(2) 14
28 U.S.C. § 1610(f)(3) 14
28 U.S.C. § 1610(g) ..... *passim*
28 U.S.C. § 1610(g)(1) 2, 16, 31, 33, 41
28 U.S.C. § 1610(g)(1)(A) 2, 33
28 U.S.C. § 1610(g)(1)(B) 2, 33
28 U.S.C. § 1610(g)(1)(C) 2, 33
28 U.S.C. § 1610(g)(2) 2, 17, 31, 32
28 U.S.C. § 1611 18

TABLE OF AUTHORITIES – Continued

Page

Antiterrorism and Effect Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214 ..... 10, 22

Emergency Wartime Supplemental Appropriations Act, 117 Stat. 559 (2003) 42

Engrossed Senate Amendment, § 1087(c)(1) 46, 47

Export Administration Act, 50 U.S.C. App. 2405, section 6(j) 11

Foreign Sovereign Immunities Act of 1976
28 U.S.C. §§ 1602 *et seq* 1, 4
28 U.S.C. § 1605(a)(7) 18
28 U.S.C. § 1608(c) 18

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702 17

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 853 (Sept. 28, 2016) 50

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3
§ 1083 ..... *passim*
§ 1083(b)(3) 45, 46
§ 1083(c)(2)(B) 15

Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, Title II, 116 Stat. 2337
§ 201(a) 9, 20
§ 201(b) 9
§ 201(d) 9
§ 201(d)(2)(A) 14

TABLE OF AUTHORITIES – Continued

Page

Trading with the Enemy Act, 50 U.S.C. App. § 5(b) 14, 17

RULES AND REGULATIONS

31 C.F.R. § 596.201 10

Seventh Circuit Rule 40(c) 23

OTHER AUTHORITIES

154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg) 57

Appendix 1 Opinion of the Court, Letter of Monroe Leigh, Legal Advisor, Department of State, dated Nov. 26, 1975 51

Br. Iran in *Bennett v. Islamic Republic of Iran*, No. 13-15442 (9th Cir. filed October 9, 2013) 34

Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle against Terrorism*, 19 Duke J. Comp. & Int'l L. 307 (2009) 31

H.R. 103-702, 103rd Cong., 2d Sess. (August 16, 1994) 10

H.R. Rep. 1585 Engrossed Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007), https://www.congress.gov/110/bills/hr1585/BILLS-110hr1585eas.pdf 46

H.R. Rep. No. 104-383 (1995) 10, 53

H.R. Rep. No. 11-447 (2007) (Conf. Rep.) 57

TABLE OF AUTHORITIES – Continued

Page

Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?* The European Journal of International Law, Vol. 21, No. 4 (2010) 53

Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (2008) 10, 43

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals for the Seventh Circuit (Pet.App. 1-38), and the opinion of Judge Hamilton dissenting from the denial of *en banc* review (Pet.App. 39-42) are reported at *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016). The decision of the District Court for the Northern District of Illinois (Pet.App. 43-71) is reported at *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014). All opinions are set forth in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The court of appeals issued its order and judgment on July 19, 2016. Pet.App. 1-38. The petition for writ of certiorari was filed on October 17, 2016. This Court granted the petition limited to the first question presented on June 27, 2017. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq*. The current version of the FSIA is set forth in an appendix to this brief. App., infra, App. 1-App. 35. The appendix also includes the full text of the legislation enacting

the FSIA's Terrorism Exception to Immunity, Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (the "NDAA of 2008" or the "NDAA") (App. 36-51). Finally, the appendix includes Section 1087 of the Engrossed Senate Amendment, dated October 1, 2007, to the NDAA (App. 52-60). Additionally, 28 U.S.C. § 1610(g), which is at issue in this case is reproduced in its entirety immediately below.

28 U.S.C. § 1610. Exceptions to the immunity for attachment or execution

* * *

(g) Property in certain actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

STATEMENT OF THE CASE

The petitioners are American victims of a terrorist attack sponsored by respondent, Islamic Republic of Iran ("Iran"). They sued Iran in federal court under the then-applicable terrorism exception to sovereign immunity and obtained a judgment for several million dollars. Pet.App. 2. The petitioners identified collections of ancient Persian artifacts (the "Artifacts") that Iran had loaned to the University of Chicago, and attempted to enforce their judgment against those Artifacts. Applying certain provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, the lower courts held that the Artifacts enjoyed foreign sovereign immunity from execution, and that no exceptions to immunity applied. This case turns on the proper construction of 28 U.S.C. § 1610(g), the terrorism exception to foreign sovereign execution immunity.

In 2008, Congress enacted 28 U.S.C. § 1610(g) as a broad remedial provision designed to expand the availability of assets for post-judgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. See National Defense Authorization Act ("NDAA of 2008" or "NDAA") for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 ("§ 1083"); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016). Subsection 1610(g) was part of a sweeping amendment to the terrorism exception to foreign sovereign immunity that was designed to remove all impediments to terrorism victims' civil lawsuits against designated state

sponsors of terrorism. See NDAA, § 1083, 122 Stat. 3, 338. All agree that subsection 1610(g) allows terrorism judgment creditors of a foreign state to "pierce the corporate veil" to execute their judgments against assets held by juridically separate instrumentalities of a foreign state defendant. The Seventh Circuit panel held that subsection 1610(g) does nothing more. Pet.App. 35. The Ninth Circuit in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 958-959 (9th Cir. 2016), held that ***in addition*** to enabling veil-piercing, subsection (g) allows attachment of all property of state sponsors of terrorism. The Seventh Circuit's construction cannot be reconciled with the text or purpose of the statute, and should be reversed.

A. Statutory Framework

1. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA replaced the prior common law-based immunity regime under which courts regularly deferred to executive branch recommendations regarding immunity. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2255 (2014). Under the former immunity regime, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488. "Congress abated the bedlam in 1976," replacing the

old system with the Foreign Sovereign Immunities Act's comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. *NML Capital, Ltd.*, 134 S. Ct. at 2255. The FSIA is codified at 28 U.S.C. §§ 1602 *et seq.*

The FSIA codified the "restrictive theory" of immunity, which, as its name suggests, restricted or limited the broad immunity previously extended to foreign sovereigns. *Verlinden*, 461 U.S. at 486. Under the restrictive theory, foreign states enjoy immunity when they engage in activities "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Conversely, it does not immunize a foreign state's conduct that is private in nature, meaning activities in which private parties may engage. *Id.* Nonetheless, even under the restrictive theory, as codified in the FSIA, foreign sovereigns are presumed to be immune from jurisdiction of United States courts, and from attachment, arrest and execution, unless a statutory exception provides otherwise. See 28 U.S.C. §§ 1604, 1609.

Applying the restrictive theory of immunity, the Court has repeatedly insisted that lower courts refrain from expanding foreign sovereign immunity beyond that conferred by statute. Thus, in *Weltover*, the Court held that the government of Argentina was subject to jurisdiction in New York when Argentina defaulted on certain government bonds that were payable in New York. 504 U.S. at 609-610. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-477 (2003), the Court again refused to expand upon the text of the FSIA to extend

immunity to subsidiaries of an instrumentality of a foreign state.

2. The FSIA provides foreign states with two types of immunity. *NML Capital, Ltd.*, 134 S. Ct. at 2256. The first, jurisdictional immunity, shields foreign sovereigns from jurisdiction of United States courts. *Id.* Sections 1605 through 1607 enumerate the exceptions to jurisdictional immunity. The second form of immunity under the FSIA pertains to the enforcement of judgments; it protects foreign sovereigns from attachment and execution as provided in 28 U.S.C. §§ 1609-1611. For consistency, we will use the term "execution immunity," unless specific reference is made to attachments.

Section 1610 enumerates the principal exceptions to execution immunity. The two most familiar provisions are subsections 1610(a) and (b). Under specified circumstances subsection (a) permits judgment creditors to execute upon the property belonging to a foreign state that is used by the foreign state for commercial activity. Pet.App. 20. Subsection (b) applies to agencies or instrumentalities of foreign states that are engaged in commercial activity in the United States. It allows execution upon property of a foreign state's agency or instrumentality to enforce judgments that relate to claims for which the agency or instrumentality is subject to jurisdiction under specified provisions of §§ 1605 and 1605A.

As a practical matter, courts construe subsection 1610(a)'s "use" requirement narrowly. See e.g., *Conn.*

Bank of Commerce v. Republic of Congo, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("*CBC*"); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-1091 (9th Cir. 2007); *Aurelius Capital Partners v. Republic of Argentina*, 582 F.3d 120, 131 (2d Cir. 2009). For example, in *CBC*, a bank attempted to garnish royalty and tax payments *owed to* the Republic of Congo by certain Texas oil companies pursuant to a joint venture. *Id.* at 246, 251. The court held that Congo had not ***used*** the funds for commercial activity. *Id.* at 257. "In ordinary usage, we would not say that the revenue from a transaction is 'used for' that transaction." *Id.* at 254. The court explained that from the point of view of the recipient, the revenue "is not put in service of that activity, instead, it is the end result or income of that activity." *Id.*

Aurelius Capital Partners, L.P. v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009), reached a similar result. There, private Argentinian pension funds holding money in the United States were, by Argentinian law, transferred to a state-administered fund. Creditors of Argentina attempted to attach the funds immediately upon transfer to the Administration. However, the assets had not been ***used for*** a commercial activity while they belonged to the state-owned entity, and the court held that they were immune from execution. 584 F.3d at 131.

The case below represents an even narrower application of the "commercial use" exception. The petitioners argued, among other things, that the Artifacts were property of Iran used by the University of

Chicago for commercial activity, and were therefore subject to execution under subsection (a)(7). However, looking beyond the statutory language, the district court held that to be subject to execution under subsection 1610(a), the property must be used ***by the foreign state itself***, and not by a third party such as the University. Pet.App. 51-52. The court of appeals affirmed.

Additional execution immunity provisions of § 1610 include subsections (f), (g), and section 201 of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, Title II, § 201(a), (b), (d), 116 Stat. 2337, 2339, which is codified as a note following § 1610.[1] These apply to attachment and execution of terrorism judgments, and were not included in the FSIA as originally enacted. They provide broad execution immunity exceptions that extend to categories of property that are otherwise immune from execution. As originally enacted, the FSIA did not include any provisions – either under the jurisdictional immunity exceptions or the execution immunity exceptions – that enabled terrorism victims to sue or enforce judgments against the foreign states that sponsored, carried out, or were

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[1] Additionally, subsection 1610(c) addresses certain notice requirements for execution of judgments. Subsection (d) addresses the very limited circumstances under which foreign state property may be subject to pre-judgment attachment. Subsection (e) codifies a narrowly-applicable exception for the arrest *in rem*, sale, and execution against vessels of a foreign state pursuant to a preferred mortgage.

otherwise responsible for terrorist attacks. See e.g., *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994).

3. In 1996, Congress provided American citizens with "an important economic and financial weapon against . . . outlaw states" that sponsored terrorism. H.R. Rep. No. 104-383, at 62 (1995). It enacted the Antiterrorism and Effect Death Penalty Act of 1996, which amended the FSIA to waive the sovereign immunity enjoyed by state sponsors of terrorism (28 U.S.C. § 1605(a)(7) (repealed in 2008 and replaced by 28 U.S.C. § 1605A). Addressing an earlier version of the legislation, the House Judiciary Committee explained that it was intended to provide a remedy for damages for United States citizens subjected to certain ***violations of international law***. H.R. 103-702, 103rd Cong., 2d Sess. (August 16, 1994), at 4, *cited in* Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (2008).

To limit the scope of the new immunity exception and to allay executive branch concerns about the possible negative impact the new law might have on foreign relations, Congress limited the terrorism exception to actions against State Department-designated "State Sponsor of Terrorism." This restriction enabled the Department of State to determine which states should be deemed "outlaw states" and subject to the new law. This restriction provision remains in effect today. 28 U.S.C. § 1605A(h)(6). At present, only three countries remain on the list of Designated State Sponsors of Terrorism: Iran, Syria, and Sudan. See 31 C.F.R. § 596.201

note ("The name of each country that has been designated under section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405, as a country supporting international terrorism is published in the Federal Register by the Department of State, and a complete list of countries currently so designated can be found via the Web site of the Department of State at http://www.state.gov/j/ct/"). Other states that were previously designated include Cuba, Iraq, Libya, and North Korea.

The 1996 amendment also provided additions to the existing execution immunity provisions that were intended to facilitate enforcement of terrorism judgments. 28 U.S.C. § 1610(a), (b). Despite these amendments to the existing execution immunity exceptions, terrorism judgment creditors faced significant practical and legal difficulties at the enforcement stage. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317-1318 (2016). ***First***, because the new execution immunity exceptions were crafted to fit within the existing framework, "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318. Even as to international law-abiding foreign state defendants, the limited judgment execution immunity exceptions would sometimes render a grant of jurisdiction over a foreign state defendant "entirely ineffectual." *Exp.-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75, 84 (2d Cir. 2014). These difficulties were compounded with state sponsors of terrorism, which due to the lack of formal relations with the United States, owned very little property in the United

States that satisfied the narrow commercial use requirements. See *In re Islamic Republic of Iran Terrorism Litig.* ("*Iran Terrorism Litig.*"), 659 F. Supp. 2d 31, 53 (D.D.C. 2009).

Second, most Iranian assets that could be found in the United States had been blocked under various regulations and executive orders, and were in the control and possession of the United States government. *Id.* at 52. Thus, the sovereign immunity of our own federal government along with "a dizzying array of statutory and regulatory authorities" to which the blocked assets were subjected prevented judgment creditors from enforcing their judgments against these assets. *Id.* at 52-53.

Third, if historically, international peaceable foreign state judgment debtors could, at least in many instances, be counted on to honor judgments entered by United States courts, the same could not be said of rogue state sponsors of terrorism, which are "particularly unlikely to submit to this country's laws." *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014).

In response to these difficulties, terrorism plaintiffs began targeting property in which Iran-owned entities held an interest. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 14 (D.D.C. 2011). This tactic, however, led the plaintiffs into yet another impediment to enforcement of their judgments: the application of this Court's decision in *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462

U.S. 611 (1983) ("*Bancec*"). See *Estate of Heiser*, 807 F. Supp. 2d at 14. *Bancec* stands for the proposition that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627. Following the *Bancec* decision, lower courts identified five basic factors to be considered when deciding whether to disregard the corporate veil of foreign state-owned entities. *Id.* at 630. Thus, as a rule, governmental corporations or other entities cannot be held liable for the debts of their foreign sovereign owners. *Id.* The *Bancec* rule, like the limitation on execution against blocked assets or non-commercial assets impeded terror victim judgment creditors' enforcement efforts. See *Estate of Heiser*, 807 F. Supp. 2d at 14. Thus, even with the amended 1996 execution immunity exceptions, most terror victim plaintiffs who successfully obtained judgments against designated state sponsors of terrorism were drawn into "a long, bitter, and often futile quest for justice." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 45-46.

4. Congress intervened to provide relief for terrorism victims holding judgments that were essentially unenforceable. *Bank Markazi*, 136 S. Ct. at 1318. Congress's first attempt to remedy this situation was the 1998 enactment of 28 U.S.C. § 1610(f), which created a new immunity exception that, for the first time, allowed execution against blocked and prohibited property designated state sponsors of terrorism. *Iran Terrorism Litig.*, 659 F. Supp. 2d at 55-56. The statute

included a Presidential waiver provision, which President Clinton exercised when he signed the bill. *Id.*

In 2000, Congress amended § 1610(f) to include only a limited waiver provision that applies to subsection (f)(1) only. *Id.* at 56. Subsection (f)(1) allows enforcement against blocked assets. The 2000 amendment did not authorize the President to waive subsection (f)(2), which calls upon the executive branch to "make every effort to fully, promptly, and effectively assist any [terrorism] judgment creditor or any court . . . in identifying, locating, and executing against ***the property*** of a foreign state subject to jurisdiction under former § 1605(a)(7) or any agency or instrumentality of such state. See 28 U.S.C. § 1610(f)(2), (3). Notably, the property subject to subsection (f)(2)'s assistance provision is not limited to blocked or regulated property that subsection (1) makes subject to execution. Subsection (f)(2) applies to all property, regardless of whether it is blocked or regulated. President Clinton again exercised his prerogative under the statute to waive the applicability of subsection (f)(1).

In 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 (the "TRIA"), which allows terror victims to execute their judgments against the blocked assets of terrorist parties as well as those of the terrorist parties' agencies or instrumentalities. *Id.* Section 201(d)(2)(A) defines "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act." However, as Judge Lamberth

observed, "[i]n the case of Iran, . . . very few blocked assets exist." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 58. Thus, TRIA offered limited relief to Iran's terrorism judgment creditors.

In 2008, Congress intervened again to expand the terrorism exceptions to foreign sovereign immunity – both as to jurisdiction and enforcement. See NDAA of 2008, § 1083, 122 Stat. 3, 338. The new terrorism exception created by § 1083 included numerous far-reaching provisions that are unique under the FSIA. Section 1083 not only provided an exception to jurisdictional immunity, it also created a statutory private cause of action against foreign state sponsors of terrorism. See 28 U.S.C. § 1605A(c). Nowhere else does the FSIA create a statutory cause of action against foreign states. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004). Section 1083 also explicitly provided for retroactive applicability. 28 U.S.C. § 1605A(a)(2). Further extending its retroactive reach, § 1083(c)(2)(B) of the NDAA of 2008 waives the defenses of res judicata, collateral estoppel, and limitation period to enable holders of judgments previously entered under the former terrorism exception to have their judgments treated as if they were entered under the amended version.

Section 1083 also created new remedies for those who obtained judgments under § 1605A. And, the conversion of judgments made these new remedies available to terrorism victims who had previously obtained judgments under the previous terrorism exception to jurisdictional immunity. One significant new remedy

was the ability to recover punitive damages from sovereign state defendants, something that is explicitly prohibited to other FSIA plaintiffs under § 1606. *Id.* at § 1605A(c). Section 1083 provides for the automatic establishment of a lien of *lis pendens* that attaches to all real and tangible personal property located within the judicial district that would be subject to execution under § 1610. 28 U.S.C. § 1605A(g). The lien attaches to property belonging to the sovereign defendant itself as well as any other entity listed by the plaintiff as being controlled by the defendant state. *Id.*

Correspondingly, section 1083 creates a new execution immunity exception tailored for holders of judgments entered under the new terrorism exception. 28 U.S.C. § 1610(g). The purpose of subsection 1610(g) was to expand the availability of assets for post-judgment execution against the property of foreign state sponsors of terrorism and their agencies and instrumentalities. *Bank Markazi*, 136 U.S. at 1318 n.2. Courts have recognized the "broad remedial purposes" of subsection 1610(g), and agreed that "a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26 (emphasis supplied).

By all accounts, at a *minimum*, subsection 1610(g)(1) abrogates *Bancec*, and enables terrorism judgments entered against a foreign state to be enforced against that state's juridically independent agencies or instrumentalities. See Pet.App. 26. The

court below held that subsection 1610(g) accomplishes nothing more. Pet.App. 27, 35. However, in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 958-959 (9th Cir. 2016), the Ninth Circuit held that ***in addition*** to abrogating *Bancec*, subsection (g) allows attachment of all property of state sponsors of terrorism regardless of whether the property satisfies some additional execution immunity exception.[2]

Subsection 1610(g)(2) provides that in addition to property that is not subject to any sanctions regime, the United States waives its sovereign immunity to allow execution upon property that is "regulated" under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. 1 *et seq.*, or the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 *et seq.* Unlike the TRIA and subsection 1610(f)(1), subsection 1610(g) does not necessarily take precedence over other provision of law. *Bank Markazi*, 136 S. Ct. 1318 n.2. Thus, for example, diplomatic and consular property remain immune. *Wyatt v. Syrian Arab Republic*, 8 F. Supp. 3d 192, 195 (D.D.C. 2015) ("property exempt from attachment under the [Vienna Convention on

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[2] The Ninth Circuit issued three successive decisions in *Bennett*, each interpreting subsection 1610(g) as an independent execution immunity exception. The first opinion, written by Judge Kozinski, is reported at *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015) (*"Bennett I"*). Upon Iran's first motion for rehearing, the decision was withdrawn and superseded by a second decision authored by Judge Graber. 817 F.3d 1131 (9th Cir. 2016) (*"Bennett II"*). Iran filed a second motion for rehearing. And, the Ninth Circuit entered its third and final decision in which it reaffirmed its prior construction of subsection 1610(g). 825 F.3d 950 (9th Cir. 2016) (*"Bennett III"*).

Consular Relations] is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611.").

B. Factual Background

1. Petitioners, United States nationals, initiated this post-judgment collection action in an attempt to enforce a money judgment entered against Iran for its sponsorship of a triple suicide bombing attack on a crowded pedestrian mall in Jerusalem, Israel on September 4, 1997. See Pet.App. 1-2; *Campuzano/Rubin v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003) (findings of fact and conclusions of law in consolidated actions). The bombing took the lives of five people and wounded nearly two hundred others.

The petitioners sued Iran in the United States District Court for the District of Columbia under the then-applicable terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7). Despite Iran's default, pursuant to 28 U.S.C. § 1608(e), the district court conducted a four-day bench trial on Iran's liability and damages.

The district court found that in the years preceding the attack, Iran's Ministry of Information and Security spent between $50 million and $100 million per year supporting various terrorist activities, and, in 1995 alone, Iran contributed $30 million to Hamas. *Id.* at 262. In addition to financial support, Iran provided Hamas with professional military and terrorist training. *Id.* The court found that support for terrorism was

an official state policy, requiring approval of high-ranking Iranian officials. *Id.* The court found that the September 4, 1997 bombing could not have been carried out without the Iranian sponsorship, and that "Iran directly provided material support and resources to Hamas and its operatives, for the specific purpose of carrying out acts of extrajudicial killing, including the bombing at issue here." *Id.* at 262, 270. The court also made detailed findings of fact concerning the victims' extensive injuries. *Id.* at 265-268. On September 10, 2003, the court entered judgment (the "Judgment") in favor of the petitioners, awarding them $71.5 million in compensatory damages against Iran. *Id.*

2. On December 29, 2003, the petitioners registered the Judgment in the United States District Court for the Northern District of Illinois, where they initiated enforcement proceedings against certain Persian artifacts (the "Artifacts") that belong to Iran, but were in the possession and use of Respondent, the Oriental Institute of the University of Chicago (the "University").[3] The petitioners argued that they were authorized to enforce the Judgment against the Artifacts under the commercial activity exception to foreign sovereign execution immunity, 28 U.S.C. § 1610(a).

The petitioners also argued that they were entitled to execute upon the Artifacts under section 201(a) of TRIA, which enables execution upon "blocked" assets of terrorist parties. See 28 U.S.C. § 1610 note.

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[3] The Field Museum of Natural History was also a party in the lower courts, but is no longer involved in this case.

Finally, after the passage of the 2008 FSIA amendments and pursuant to those amendments, petitioners moved in the District Court for the District of Columbia for an order giving their Judgment effect as if the action had originally been filed under the new § 1605A. *Rubin v. Islamic Republic of Iran*, 563 F. Supp. 2d 38, 39 n.3 (D.D.C. 2008). The court granted their motion. *Id.* With their Judgment converted to a § 1605A judgment, the Rubins were empowered to seek attachment of Iran's assets under 28 U.S.C. § 1610(g), and they asserted that additional ground for recovery in the Northern District of Illinois.

Iran and the University moved for summary judgment, arguing that none of these execution immunity exceptions applied to the Artifacts. The petitioners asserted that subsection 1610(a) allowed them to attach and execute upon the artifacts because the artifacts satisfied all of the requirements for enforcement under subsection 1610(a): The Artifacts were property in the United States, belonging to Iran, and were being used by the University for commercial activity in the United States. The district court acknowledged that "Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign." Pet.App. 51. However, it concluded that subsection 1610(a) applies only where the foreign sovereign ***itself*** uses the property for commercial activity. Pet.App. 54.

The court held that TRIA was inapplicable because section 201(a) applies only to "blocked" assets, and the court concluded that the Artifacts had been

unblocked. They were therefore not subject to TRIA. Pet.App. 66.

Finally, the district court held that the Artifacts were not subject to execution under subsection 1610(g). The district court held, "plaintiffs have virtually no support for their contention that Section 1610(g) expands the bases for attachment." Pet.App. 60-61. The court found that construing subsection 1610(g) to allow attachment of ***all*** property of a state sponsor of terrorism would render superfluous subsections (a)(7) and (b)(3), both of which allow attachment of commercial property pursuant to terrorism judgments. Pet.App. 60-61.

The district court held that subsection (g) merely allowed execution upon property that was otherwise excepted from immunity in section 1610. Pet.App. 61-62. Thus, the district court concluded that "Section 1610(g) does not provide a new basis for plaintiffs to attach the assets of Iran." Pet.App. 62. It accepted the respondents' argument that subsection 1610(g) merely enables terrorism victim judgment creditors of foreign sovereigns to "pierce the corporate veil" and enforce their judgments against the agencies and instrumentalities of the foreign sovereigns. Pet.App. 62. The district court granted Iran's and the Museums' motions for summary judgment. Pet.App. 71.

3. The Seventh Circuit affirmed the judgment entered against the petitioners. Pet.App. 1-38. The court of appeals rejected petitioners' subsection 1610(a) argument that property of a foreign sovereign

used for a commercial activity is subject to attachment regardless of who uses the property. Pet.App. 17. The Seventh Circuit also affirmed that district court's holding under TRIA that the Artifacts were "uncontested" property, and had therefore been unblocked by Executive Order 12281. Pet.App. 37-38.

The Seventh Circuit held that subsection 1610(g) is not an immunity exception at all, but merely a provision that enables plaintiffs to pierce the corporate veil of state-owned agencies and instrumentalities. Pet.App. 4, 35. The court held that enforcement of judgments under subsection 1610(g) is available only against property that is otherwise subject to execution under section 1610. Pet.App. 27, 35. The court also adopted the district court's understanding that construing subsection 1610(g) to create an independent immunity exception would render superfluous the execution immunity provisions that were introduced as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241. Pet.App. 27-28.

Thus, the Seventh Circuit expressly rejected the Ninth Circuit's holding in *Bennett*, 825 F.3d 949, *supra*, that subsection 1610(g) is an independent exception to execution immunity intended to allow terrorism victims to execute upon any of a defendant sovereign's United States assets. Pet.App. 32-35. The court below also overruled two of the Seventh Circuit's own precedents, both of which had interpreted subsection 1610(g) as being an independent immunity exception, not subject to the limitations of subsections (a) and (b).

Pet.App. 34-35, *overruling Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015).

Seventh Circuit Rule 40(e) creates a mechanism for the court to *sua sponte* circulate an opinion for *en banc* consideration when a decision either creates a circuit split or overrules circuit precedent. See Pet.App. 35 n.6; Pet.App. 39. The panel decision below required circulation for consideration of *en banc* review under both prongs of Circuit Rule 40(e). However, because a majority of the active judges had been disqualified from hearing the case, it was impossible to garner the votes of a majority to rehear the case *en banc*. Pet.App. 36 n.6; Pet.App. 39. Without the possibility of rehearing *en banc*, the three-judge panel entered its judgment. Pet.App. 36 n.6.

Judge Hamilton, who was not on the panel below, but had authored the two decisions the court overruled, dissented from the denial of *en banc* review. Pet.App. 39. While reluctantly conceding that the panel had "the power to overrule circuit precedent and to create a circuit split," Judge Hamilton asserted that it was "a mistake" to do so. Pet.App. 39. His objection was based both upon the principle of *stare decisis* and on the merits. Pet.App. 39.

As to the merits, Judge Hamilton refrained from engaging in the textual arguments, which "are laid out in *Bennett* and *Rubin*." Pet.App. 41. However, because he concluded that subsection 1610(g) is ambiguous,

Judge Hamilton cited *Bennett*'s finding that the "legislative history of [the] 2008 amendments shows broad intent to facilitate execution of judgments against ***any*** property owned by state sponsors of terrorism." Pet.App. 41 (emphasis in original); *quoting Bennett*, 825 F.3d 961-962. Judge Hamilton concluded: "We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel." Pet.App. 42.

The petitioners filed a timely petition for a writ of certiorari seeking review of the Seventh Circuit's construction of subsections 1610(a) and (g). And on June 27, 2017, this Court granted the petition only as to the construction of subsection (g).

SUMMARY OF THE ARGUMENT

While subsection 1610(g) is an ambiguous provision, its text, purpose, and history demonstrate that it is intended to enable judgment creditors to execute their judgments against all property of foreign state sponsors of terrorism. The Seventh Circuit's narrow construction that requires judgment creditors proceeding under subsection 1610(g) to additionally satisfy the strict commercial use requirements, creates internal inconsistencies and impossibilities that render subsection 1610(g) all but meaningless.

The Ninth Circuit's expansive construction is consistent with the purpose and history of the statute, and

provides a cleaner read of the statutory text. The Seventh Circuit is wrong in holding that a freestanding expansive subsection 1610(g) would render superfluous other terrorism execution immunity exceptions contained in subsections (a)(7) and (b)(3). Congress retained those provisions to cover cases that are not included within subsection 1610(g), either because the judgments were entered under the former terrorism exception to jurisdictional immunity, to which subsection 1610(g) does not apply, or because the judgments are otherwise not enforceable under subsection 1610(g).

The "as provided in this section" clause creates textual tension under either the Seventh or Ninth Circuit's construction. The Seventh Circuit would read that clause to restrict judgment creditors proceeding under subsection 1610(g) to property that can satisfy a commercial use requirement. This limitation itself creates the internal inconsistencies referred to above. The Ninth Circuit would apply the clause to procedures under subsection (f), an earlier terrorism exception to execution immunity. This reading makes sense because Congress designed those procedures to deal with terrorism cases and they provide assistance in executing upon blocked assets, both of which are relevant to execution of judgments under subsection 1610(g).

The weakness, if any, in the Ninth Circuit's construction is that the reference to "this ***section***" should be a reference to ***subsection*** (f). But this difficulty in the Ninth Circuit's reading of the statute cannot be determinative because due to the internal inconsistencies in the Seventh Circuit's reading, as applied,

subsection 1610(g) would work only under very limited circumstances, and only in conjunction with subsection (a)(7).

An alternative interpretation of "as provided in this section" suggests that "this section" refers to the legislation, itself – § 1083 of the NDAA of 2008. This construction gives meaning to both "this section" and to subsection 1610(g) as a whole.

Finally, the legislative purpose and history together with subsection 1610(g)'s inclusion within a comprehensive terrorism exception support the expansive construction of the execution immunity exception. Congress has stated clearly and consistently that it seeks to afford meaningful relief to victims of state sponsored terrorism. Considerations of international comity have no place in dealing with the less-than-a-handful of designated state sponsors of terrorism. And, to the extent comity would apply by virtue of Iran's status as a sovereign state, Congress has the power to, and in fact did, legislate to place the interests of the terrorism victims and of our national interests above the interests of international comity.

ARGUMENT

A. Introduction.

Congress enacted subsection 1610(g) with the specific purpose of removing the remaining obstacles to terrorism judgment enforcement. See *Bank Markazi*, 136 S. Ct. 1318 n.2. "[A] core purpose of [section 1610(g)] is to ***significantly expand*** the number of

assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26; see also *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Accordingly, contrary to the decision below, subsection 1610(g) permits victims of terrorism to enforce their judgments against any United States property in which a state sponsor of terrorism holds any interest. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010); *Weinstein*, 831 F.3d at 483 ("section 1610(g) strips execution immunity from ***all*** property of a defendant sovereign.") (emphasis in original). Specifically, subsection 1610(g) permits execution against property even where the strict commercial use requirements of subsection 1610(a) are not satisfied. *Kirschenbaum v. 650 Fifth Avenue*, 830 F.3d 107, 123 (2d Cir. 2016); see also *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014), *overruled by Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016); and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015), *overruled by Rubin v. Islamic Republic of Iran*, 830 F.3d 470. Moreover, subsection 1610(g) makes assets of designated state sponsors of terrorism available for execution regardless of whether they are blocked. *Bank Markazi*, 136 S. Ct. at 1318 n.2; *Harrison v. Republic of Sudan*, 838 F.3d 86, 96-97 (2d Cir. 2016). Finally, and as even the court below agreed, subsection 1610(g) enables judgment creditors of state sponsors of terrorism to pierce the corporate veil of state-owned, juridically separate agencies or instrumentalities. Pet.App. 35; see also *Bank Markazi*, 136 S. Ct. at 1318 n.2; *Bennett*, 825 F.3d at 958-959 (9th Cir. 2016).

In one of the first decisions to both construe and apply subsection 1610(g), then-Chief District Judge Lamberth held that based upon both its ***text*** and ***purpose***, subsection 1610(g) "subject[s] ***any*** property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Estate of Heiser*, 807 F. Supp. 2d at 21 (emphasis supplied). Addressing the statute's text, Judge Lamberth held, "[i]n crafting the broad remedial language of § 1610(g), Congress made no exceptions to its reach." *Id.* at 26. And, he wrote, "a core purpose" of the 2008 FSIA amendments was "to significantly expand the number of assets available for attachment in satisfaction of terrorism-related judgments. . . ." *Id.*

Likewise, in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960 (9th Cir. 2016), the Ninth Circuit also relied expressly on the ***text*** and ***purpose*** of subsection 1610(g), and held that the statute enables execution upon ***any*** assets of a foreign state or its agencies or instrumentalities. The Ninth Circuit refused to construe subsection 1610(g) as applying only where property used by the foreign state for a commercial activity, as required under subsection 1610(a), or where the state instrumentality is engaged in commercial activity in the United States, as required under subsection 1610(b). Imposing such a requirement would "read into § 1610(g) a limitation that Congress did not insert." *Bennett*, 825 F.3d at 960.

However, in the case below, the Seventh Circuit panel explicitly disagreed with *Bennett*, overruled its own earlier decisions in *Gates* and *Wyatt*, and held that

subsection 1610(g) does no more than enable terrorism judgment creditors to enforce their judgments against the foreign states' instrumentalities that have been established as separate juridical entities. Pet.App. 34. The court further limited the applicability of subsection (g) by holding that it applies only where the judgment creditors can satisfy the strict requirements of subsections 1610(a) or (b). The Seventh Circuit's narrow construction cannot be squared with subsection 1610(g)'s statutory text or purpose. Accordingly, the decision below remains an aberration among the decisions addressing the statute's meaning and reach.

The starting point for any question of statutory construction is a review of the language of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). However, where the language of the statute is ambiguous the Court examines the legislative background and basic purposes. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007). Subsection 1610(g) is ambiguous. Pet.App. 41; *Bennett*, 825 F.3d at 961. The Seventh Circuit's narrow construction cannot be reconciled with subsection 1610(g)'s language, the legislative background or basic purposes. The decision below should be overruled.

I. The text of subsection 1610(g) compels an expansive construction that is not limited by other provisions within § 1610.

A. The Seventh Circuit's construction renders subsection 1610(g) a self-contradictory, self-defeating provision that could almost never be applied.

The opening clause of subsection 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

1. Subsection 1610(g) allows attachment of "the property" of the foreign state judgement debtor and "the property" of an agency or instrumentality[4] of such a state. The word property is not modified; subsection 1610(g) imposes no restrictions on the type of property that is subject to execution. Additionally subsection 1610(g) reaches property that is a separate juridical entity or an interest held directly or indirectly in a separate juridical entity. See *Peterson*, 627 F.3d at 1123 n.2; *Weinstein*, 831 F.3d at 483; *Gates*, 755 F.3d at 576; Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle against Terrorism*, 19 Duke J. Comp. & Int'l L. 307, 332-333 (2009), *quoted in Heiser*, 807 F. Supp. 2d at 19 n.8. By waiving United States sovereign immunity as to blocked or other regulated assets of the foreign state or its agencies, subsection 1610(g)(2) demonstrates that subsection (g)(1) allows execution upon both blocked and unblocked property.

Contrast subsection 1610(a), which allows execution only where the property is (i) used (ii) by the foreign state, itself, (iii) for a commercial activity (iv) in the United States, ***and*** one of the enumerated exceptions applies. (see subsection 1610(a)(1)-(7)). See e.g., *Kirschenbaum*, 830 F.3d at 123 and n.9. By its terms,

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[4] For purposes of this case, any distinction between an "agency" or an "instrumentality" is largely irrelevant. Unless critical to the analysis this brief will refer to both as an "agency."

subsection 1610(g) does not refer to these additional requirements. Additionally, subsection (a) provides no mechanism for execution upon blocked property, which is explicitly permitted by subsection 1610(g)(2).

The court below held that subsection 1610(g) enables judgment creditors to execute their judgments upon the property of the foreign state's agencies. But, based upon the "as provided in this section" clause of subsection 1610(g), "they must satisfy an exception to execution immunity found elsewhere in § 1610 – namely, subsections (a) or (b)." Pet. App. 35.

Applying this construction of subsection 1610(g) while attempting to satisfy the requirements of subsection 1610(a) creates internal contradictions. "By its own terms, § 1610(g) eschews" the restrictions based upon any "commercial" nature of the property, the use, if any, of the property, or the ***user*** of the property. *Ministry of Defense & Support for the Armed Forces v. Cubic Def. Sys.*, 984 F. Supp. 2d 1070, 1095 (S.D. Cal. 2013) ("Ministry of Defense"). This conclusion is not based only upon the fact that the word "property" in subsection 1610(g) is not modified by any use requirement. The real contradiction is based upon several of the so-called "*Bancec*" factors listed in subsection 1610(g)(1)(A)-(E). These factors cannot be reconciled with a requirement that the property being attached must be used by the foreign state judgment debtor for commercial activities. See *id.*

To illustrate, subsection 1610(g)(1)(C), provides that property of the foreign state may be executed

upon "regardless of" the degree to which officials of the foreign state manage property or otherwise control its daily affairs. This provision could almost never be reconciled with a requirement that the foreign state itself use the property for commercial activity. Similarly, subsection 1610(g)(1)(A) allows attachment regardless of the level of economic control the foreign state exerts over the property. And, subsection 1610(g)(1)(B) provides that property is subject to execution regardless of whether the profits generated by the property go to the government. Thus, by its terms, subsection 1610(g)(1) which enables execution upon foreign state-owned property ***"regardless of"*** significant use and financial factors, cannot at the same time, require satisfaction of the strict commercial or use requirements of subsection 1610(a).

2. Textually, reconciling subsection 1610(b) with subsection 1610(g) is even more problematic. Subsection 1610(b) provides that the property of a foreign state's ***agency*** is subject to execution ***only*** where the agency is engaged in commercial activity in the United States ***and*** where the agency has either waived its immunity or the judgment relates to a claim for which the agency is not immune under one of the jurisdictional immunity exceptions to immunity. 28 U.S.C. § 1610(b)(1)-(3). Subsection 1610(g) does not require that the agency be engaged in commercial activity within the United States. Additionally, subsection 1610(g) enables terrorism judgment creditors of the ***foreign state*** defendant to enforce the judgment against the state's ***agencies*** (by abrogating *Bancec*).

Thus, subsection 1610(g) permits execution against property of the ***agency*** even where the judgment is entered against the foreign state, alone, and not against the agency. The court below held that subsection 1610(g) enables execution only through satisfaction of the requirements of subsections (a) and (b). But superimposing the restrictions of subsection 1610(b) onto subsection 1610(g) would render subsection 1610(g) a nullity (assuming, as the court below held, that subsection 1610(g) does nothing but abrogate *Bancec*).

Consider the facts of *Bennett v. Islamic Republic of Iran*, S. Ct. Case No. 16-334. There, terrorism judgment creditors of Iran sought to enforce their judgment against money Visa allegedly owed to Bank Melli, an Iranian financial institution wholly owned by the Iranian government. Visa owed money to Bank Melli under a contract. But following the imposition of sanctions in 1996, Visa stopped payments to Bank Melli, and invested the money owed with a mutual fund. See Br. Iran in *Bennett v. Islamic Republic of Iran*, No. 13-15442, at 12-13 (9th Cir. filed October 9, 2013). Iran argued that the terrorism victims could not enforce their judgments against the money owed to Bank Melli because subsection 1610(g) enables execution only where the judgment creditors are able to satisfy subsection (a) or (b). *Id.* at 46.

Iran then argued that "[t]he only potentially relevant exception here is § 1610(b)(3), which provides that 'property in the United States of an agency or instrumentality of a foreign state ***engaged in commercial activity in the United States*** shall not be

immune from attachment' if 'the judgment relates to a ***claim for which the agency or instrumentality is not immune*** by virtue of section 1605A.'" *Id.* at 46-47 (emphasis in original). Iran asserted that "[t]here is no allegation that Bank Melli is 'not immune' from the underlying claim. . . ." *Id.* at 47. Thus, Iran argued that even if subsection 1610(g) abrogates *Bancec* for enforcement of § 1605A judgments, a plaintiff attempting to execute upon property of the state defendant's ***agency*** would still be required to demonstrate that the agency, in its own right, is liable for the underlying claim. See *id.* Thus, by reading all of the restrictions of subsection 1610(b) into subsection 1610(g), Iran would make it ***impossible*** to apply subsection 1610(g). But this is the construction that the Seventh Circuit adopted below.

Moreover, according to Iran's argument, subsection 1610(g) would make matters worse for judgment debtors. Under *Bancec*, a plaintiff must demonstrate justification to pierce the corporate veil of the foreign state's agency. But Iran's proposed construction of subsection 1610(g) would require the plaintiffs to prove that the agency itself is independently liable for the underlying § 1605A claim. If the plaintiffs could prove the agency's liability, they would not need to pierce the corporate veil to execute upon the agency's property under subsection 1610(g). They would have sued the agency in the first instance and enforced their judgment directly.

According to Iran's Ninth Circuit brief in *Bennett*, if the Seventh Circuit below is right and subsection (g)

requires the satisfaction of some other § 1610 execution immunity exception, subsection (b) cannot be an option. Under Iran's argument in *Bennett*, (and absent a waiver of immunity, see subsection 1610(b)(1)), it would be ***impossible*** to satisfy all of the restrictions of subsection 1610(b) and, at the same time, benefit from the veil piercing function of subsection 1610(g). If the ***agency*** is not immune under § 1605 or § 1605A, then a judgment creditor would not need to abrogate *Bancec*. And, if the agency or instrumentality is immune, according to the Seventh Circuit's construction of subsection 1610(g) abrogating *Bancec* will not help because subsection (b), by its terms, simply does not apply.

3. Notwithstanding these textual difficulties, the Seventh Circuit held that subsection 1610(g) operates only through subsections (a) or (b). The panel below based its holding on two principal arguments. ***First***, the court held that the words in subsection 1610(g)(1), "as provided in this section" would be "entirely superfluous" if subsection (g) does not refer to the other provisions of § 1610. Pet.App. 27.

Second, the court held that if subsection 1610(g) were a freestanding and almost limitless execution exception, subsections 1610(a)(7) and 1610(b)(3), which also relate to enforcement of terrorism judgments would likewise be superfluous. Pet.App. 27-28. Thus, both reasons for the court's rejection of the subsection 1610(g) construction favored by the vast majority of courts boil down to "the 'cardinal principal' that a statute should be interpreted to avoid superfluity." Pet.App. 27, *citing TRW, Inc. v. Andrews*, 534 U.S.

19, 31 (2001). But that does not withstand rationale scrutiny.

The Seventh Circuit held that subsection 1610(g)'s "as provided in this section" clause can ***only*** be understood to incorporate subsections 1610(a) and (b) into subsection 1610(g). Pet.App. 27, 35. Thus, the court held that subsection 1610(g) requires terrorism plaintiffs to satisfy one of those § 1610 provisions to enable execution. The Ninth Circuit explained that the phrase, "as provided in this section," refers to procedures contained in subsection 1610(f). *Bennett III*, 825 F.3d at 959. The Seventh Circuit rejected this interpretation as "highly strained." Pet.App. 33. However, the Seventh Circuit's decision fails to account for numerous textual elements that render its own construction not only strained, but unintelligible.

Assume that the Seventh Circuit correctly held that subsection 1610(g) merely "removes the *Bancec* barrier," which requires FSIA plaintiffs to overcome the presumption that government instrumentalities established as separate juridical entities are to be treated as legally distinct from the foreign sovereign. Pet.App. 4. Now, consider the opening clause of subsection 1610(g):

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid

> of execution, and execution, upon that judgment as provided in this section, regardless of – [the five *Bancec* factors].

This clause refers to three categories of property: (i) "property of a foreign state against which a judgment is entered under section 1605A;" (ii) "property of an agency or instrumentality of such a state;" and (iii) "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." Removing the *Bancec* barrier merely enables judgments against foreign states to be enforced against the states' juridically independent agencies and instrumentalities. Thus, it is reasonable that the statute would allow execution upon property that falls into category (iii).

But, the Seventh Circuit's construction cannot account for the statute's inclusion of categories (i) and (ii). The *Bancec* barrier could ***never*** interfere with execution upon "property of a foreign state" for purposes of enforcing a judgment entered against that very state. It is absurd to even discuss the separate entity rule in such a case. The same holds true for "property of an agency or instrumentality" that is not separate juridical entity. There is neither a need nor a possibility of removing a separate entity barrier when there is no separate entity. When judgment creditors seek to enforce their judgments against property of the state defendant, itself, or against property of agencies and instrumentalities that are not juridically separate, it is incongruous to even mention *Bancec*.

Moreover, as discussed above in reference to Iran's Ninth Circuit brief, ***if*** the Seventh Circuit is correct in holding that subsection 1610(g) is only operative where the requirements of another execution immunity exception has been satisfied, the only possible partner for subsection 1610(g) would be subsection 1610(a). According to Iran, subsection 1610(b) is eliminated because in the absence of a waiver of immunity by the agency, subsection 1610(b) applies only to enforcement of judgments that relate to claims for which ***the agency or instrumentality***, itself, is not immune under one of the jurisdictional immunity exceptions. See 28 U.S.C. § 1610(b)(1)-(3).

Furthermore, as the Seventh Circuit implicitly recognized, the other provisions of § 1610 would not pair with subsection 1610(g) to enable execution upon the property of a foreign state defendant's juridically separate agencies. Subsection (c) refers to certain notice requirements applicable under subsection (a) and (b), and does not enable any execution of judgments. Subsection (d) refers to prejudgment attachment and requires an explicit waiver by the defendant and other restrictions that would not facilitate enforcement of a terrorism judgment. Subsection (e) refers to the in rem arrest of a vessel pursuant to a first mortgage, again, a circumstance that is not relevant to enforcement of terrorism judgments. Finally, the Seventh Circuit held that subsection (f) is, for all intents and purposes, a dead letter, due to the presidential waiver of subsection (f)(1).

Thus, according to the Seventh Circuit's construction, "as provided in this section" refers to subsection 1610(a)(7), only. And, the "as provided in this section" clause of subsection 1610(g) should read, "as provided in ***sub***section (a)(7)." The *Rubin* panel objected to the Ninth Circuit's interpretation of "as provided in this section" because, the court wrote, "it implausibly reads the word "section" as "*sub*section," so the phrase "as provided in this section" actually means "as provided in *subsection (f)*." Pet.App. 33 (emphasis in original). But the Seventh Circuit's construction is even more problematic; according to the panel below, the phrase "as provided in this section" actually means "as provided in subsection (a)(7)."

B. A broad construction of subsection 1610(g) would not render other provisions superfluous.

The Seventh Circuit also objected to treating subsection 1610(g) as a comprehensive execution immunity exception because, it held, to do so would render subsections 1610(a)(7) and 1610(b)(3) superfluous. Pet.App. 27. Those subsections were enacted in 1996 with the original terrorism exception to jurisdictional immunity. They permit enforcement of terrorism judgments under the standard commercial use exceptions to execution immunity. Subsection 1610(g) applies only to terrorism judgments entered under § 1605A. It permits execution upon a wider range of assets than subsections 1610(a)(7) and (b)(3). Nonetheless, subsection

1610(g) does not render the conventional execution immunity exceptions superfluous.

When Congress enacted section 1083 of the NDAA of 2008, it created additional remedies for terrorism victims, including the expanded judgment execution possibilities available under subsection 1610(g). But, by its terms, subsection 1610(g) applies only to enforcement of judgments entered under the new terrorism exception to jurisdictional immunity, 28 U.S.C. § 1605A, and older judgments that have been converted to § 1605A judgments, as permitted by section 1083. Subsection 1610(g) does not apply to enforcement of older judgments – those that were entered under former § 1605(a)(7), the original terrorism exception and that were not converted to § 1605A judgments. See 28 U.S.C. § 1610(g)(1). Congress retained subsections (a)(7) and (b)(3) to enable enforcement of those older judgments. See *Gates*, 755 F.3d at 576 n.4; *accord Iran Terrorism Litig.*, 659 F. Supp. 2d at 40, *citing Simon v. Republic of Iraq*, 529 F.3d 1187, 1192 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). These provisions are not superfluous.

Congress had an additional reason to retain the execution immunity exceptions of subsections (a)(7) and (b)(3). It needed these provisions to provide relief in other sets of cases that may not be covered by subsection 1610(g). One such example involved terrorism cases against Iraq, which had been a designated state sponsor of terrorism from 1990 until 2003, when the United States and its allies overthrew the Saddam

Hussein dictatorship. *Republic of Iraq v. Beaty*, 556 U.S. 848, 852 (2009). The United States focused its efforts on rebuilding Iraq as a stable ally. *Id.* Treating Iraq as an outlaw terror-sponsoring state was inconsistent with that goal. *Id.*

In 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act, 117 Stat. 559, 579 (2003) ("EWSSA"), which among other things, authorized the President to make inapplicable to Iraq any laws that applied to countries that supported terrorism. *Beaty*, 556 U.S. at 852-853. The President exercised that authority. However, in 2004, the D.C. Circuit held that the President lacked authority to waive § 1605(a)(7). *Acree v. Republic of Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004). Thus, some federal courts believed that victims of Iraq-sponsored terrorism were authorized to sue and maintain their actions against Iraq under former § 1605(a)(7). And, when Congress enacted § 1083, it included a provision purporting to ratify the *Acree* decision. See *Republic of Iraq v. Beaty*, 556 U.S. 848, 853 (2009). However, Iraq's susceptibility to suit under the original terrorism exception remained uncertain.

Section 1083 also authorized the President to waive the 2008 FSIA amendments as to Iraq. President Bush exercised that authority immediately upon signing the NDAA of 2008 into law. Based upon *Acree* and the § 1083 provision that sought to ratify *Acree*, it was reasonable to believe that Iraq was subject to suit under the former terrorism exception. And, because

the President waived § 1083 as to Iraq, it was reasonable to believe that subsection 1610(g) did not apply to Iraq. Thus, a 2008 CRS Report for Congress reviewed the FSIA terrorism provisions including § 1083 and concluded that while the President waived § 1083 as to Iraq, that waiver did not terminate cases proceeding under the former § 1605(a)(7). See Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (2008) at 47 n.162. The report added that "arguably, the waiver of § 1083 has no impact on assets sought to be attached to satisfy judgments against Iraq under previous 28 U.S.C. § 1605(a)(7)." *Id.* Those assets would have been subject to execution only under § 1610(a)(7). *Id.*

In *Beaty*, 556 U.S. 848, the Court overruled the D.C. Circuit's holding in *Acree*, and held that claims could not proceed against Iraq under the former § 1605(a)(7). The Court held that President Bush's 2003 waiver of all antiterrorism laws as to Iraq terminated any claims under the terrorism exception, and that even claims against Iraq under the former § 1605(a)(7) were prohibited. But at the time § 1083 was enacted, the applicability to Iraq of the FSIA's terrorism exception was uncertain, and based upon *Acree*, Iraq appeared to remain subject to § 1605(a)(7). And, that mere uncertainty justified Congress's retaining the former execution immunity exceptions to provide some avenue for relief to judgment creditors of Iraq. Thus, even after the enactment of subsection 1610(g), subsections (a)(7) and (b)(3) are necessary to protect judgment creditors who, for whatever reason would not

be able to enforce their judgments under the new provision.

C. Subsection (g)'s reference to "this Section" does not require the satisfaction of the requirements of subsections (a) or (b).

1. The Seventh Circuit held that subsection 1610(g) "as provided in this section" clause necessarily requires the satisfaction of the requirements contained in subsections (a) or (b). As explained above, "as provided in this section" cannot possibly be so construed. The tension created by importing the contradictory terms of (a) and (b) into subsection (g), as well as the history of the legislation drove the Ninth Circuit to explicitly reject that construction, notwithstanding Iran's and the government's fierce objections. See *Bennett*, 825 F.3d at 960. *Bennett* held that the term "this section" refers to "procedures contained in subsection (f)." The Seventh Circuit called this construction "highly strained." Pet.App. 33. But if the alternative is the Seventh Circuit's construction, strained is preferable to self-contradictory and self-defeating.

But, the Ninth Circuit's construction is not so strained. Both subsections (g) and (f) were specifically tailored to facilitate enforcement of terrorism judgments. Both enable judgment creditors to execute upon blocked and regulated property, although subsection (g) reaches unblocked property as well. *Bank Markazi*, 136 S. Ct. 1318 n.2. Note that if even some of the property that can be reached under subsection 1610(g) is

blocked, that provision cannot work via subsections (a) or (b), neither of which, according to the Seventh Circuit, would allow execution upon blocked assets, because such assets cannot be "used" by the foreign state or its agencies.

After President Clinton waived the applicability of § (f)(1), it makes sense for a new exception to executional immunity to refer to procedures codified in section (f)(1) because those procedures were specifically written to apply to actions to enforce terrorism judgments. The Ninth Circuit's construction also satisfies the broad remedial purposes of § 1083, and is consistent with the history of the various terrorism exceptions to foreign jurisdictional and executional immunity

2. There is a third, alternative construction that resolves much of the tension created by both *Rubin* and *Bennett*. The words, "this section" in the "as provided in this section" clause do not refer to section 1610 at all. Rather, "this section" refers to the entirety of section 1083 of the NDAA of 2008. App. 36-51. Section 1083 in the NDAA, is titled, "Sec. 1083. Terrorism Exception to Immunity." Subsection 1083(a)(1) creates 28 U.S.C. § 1605A, and names it: "Terrorism exception to the ***jurisdictional*** immunity of a foreign state." App. 37 (emphasis supplied). The entire § 1083 applies to both jurisdictional and executional immunity exceptions for terrorism cases.

Section 1083(b)(3), enacted subsection 1610(g). See App. 44. An earlier version of the NDAA contained

a slightly different version of subsection 1610(g) that says the following in the opening lines of what became subsection 1610(g) (App. 57-58):

> (g) Property in Certain Actions. –
>
> (1) In General. – The property of a foreign state, or agency or instrumentality of a foreign state, against which a judgment is entered under ***this section***, including property that is a separate juridical entity, is subject to execution upon that judgment ***as provided in this section***, regardless of – [the *Bancec* factors]

See H.R. Rep. 1585 Engrossed Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007) (App. 52-60) (emphasis supplied). One of the differences between § 1087(c)(1) of the Engrossed Senate Amendment and the final version of the execution immunity provision in § 1083(b)(3), is that in the earlier version, quoted above, the term "this section" appears twice. In § 1083(b)(3), the first reference to "this section" is changed to read, "against which a judgment is entered under section 1605A." App. 44. But the second reference to "this section" is not changed. It is odd, to say the least, that the same phrase, "this section" appearing twice in the same sentence of a single statute would refer to two different "statutes." As ultimately codified in subsection 1610(g), if the Seventh and Ninth Circuits are right, the first reference to "this section" means § 1605A; and the second means subsection 1610(g). Granted, one could claim that the inconsistency was detected and corrected in § 1083(b)(3). But, the "corrected" version creates a statute that is

difficult to read no matter what meaning is attributed to the "as provided in this section" clause.

But what if the two references to "this section" contained in § 1087(c)(1) of the Engrossed Senate Amendment are consistent, and they both refer to § 1087 in its entirety? Then, the first "this section" was correctly changed to refer specifically to the subsection of the bill that became a section in its own right – § 1605A. But the second "this section" could refer specifically to § 1605A, or it could refer generally to the entire § 1087.

Note that each of the remaining provisions of section 1087 and later section 1083, which were not codified in the United States Code, but appear in the notes following § 1605A, all refer to "this section," and in each case, "this section" clearly refers to § 1083 or § 1087, as the case may be (and they are, for the most part, substantially similar). Consider § 1083. Subsection (c) provides for the retroactivity of the terrorism exceptions. It opens, "(1) In General. – The amendments made in ***this section*** shall apply to any claim arising under § 1605A. . . ." (emphasis supplied). Here, § 1083(c) cannot refer to its own codified section because it was never further codified. "This section" ***must*** refer to § 1083. The same is true for § 1083(d), which authorizes the President to waive any provision of "this section" as to Iraq, and § 1083(e), which provides for severability in the event a provision of "this section" is invalidated.

If the "as provided in this section" clause is understood to be consistent with the other references to "this

section" in the bill, it can be read sensibly. As discussed, above, § 1083 includes some unique provisions. For one, it allows damages that are not or might not be available under other provisions of the FSIA. These include punitive damages, claims for property loss, and various insurance-related claims. 28 U.S.C. § 1605A(c)(4), (d). Section 1606 specifically precludes punitive damages against a foreign state. If "as provided in this section" modifies the word "judgment" that precedes it, and refers to the entire § 1083, then subsection 1610(g) is telling us that judgment creditors may resort to its far-reaching execution provisions even beyond the amount of the compensatory damages, and that it overrides the prohibition on punitive damages contained in § 1606.

Additionally, § 1605A(g) provides for the imposition of a lien of *lis pendens* on all of the foreign state defendant's real and tangible personal property that is located in the judicial district so long as the property is subject to attachment and execution under § 1610. In the Engrossed Senate Amendment, that provision is not qualified by § 1610. The *lis pendens* applies without restriction. If § 1610 were always intended to be limited by the commercial use restrictions of subsection 1610(a) and (b), a pre-judgment lien provision would never have provided for an unlimited lien on all property. But, if subsection 1610(g) creates a freestanding execution immunity provision that reaches almost all of a foreign state's property, then an unlimited pre-judgment lien provision would be consistent with that final remedy. The amendment restricting the lien of *lis pendens* to property subject to § 1610 was intended to

take into account the prohibition against executing upon diplomatic, military, and certain central bank property that undeniably apply to subsection 1610(g).

Thus, reading "this section" as referring to § 1083, which includes ***both*** of the terrorism exceptions to sovereign immunity gives meaning to the "as provided in this section" clause, and is consistent with the other references to "this section" in § 1083. This construction is not self-contradictory, self-destructive, or "strained."

II. Any uncertainty as to the meaning of subsection 1610(g) should be resolved by giving effect to the clear legislative purpose behind § 1083 of the NDAA of 2008.

A. Deterring terrorism and providing relief to its victims outweigh considerations of grace and comity as to state sponsors of terrorism, which do not deserve such solicitude.

1. In *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), the Court observed that, prior to the enactment of the FSIA, the United States "***generally*** granted foreign sovereigns complete immunity from suit in courts of this country." (emphasis supplied). When the courts of one state rule on the legality of another state's governmental acts or judicially seize the other's property they risk seriously affronting the dignity of the foreign government. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 700, 703-704 (1994). Nevertheless, *Verlinden* teaches that

"foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." 461 U.S. at 486.

Verlinden provides context for the legislated "purpose" of the most recent terrorism-related amendment to the FSIA, the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 853 (Sept. 28, 2016) ("JASTA"). In JASTA Congress explicitly articulates its intent:

> Purpose. – The purpose of this Act is ***to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States***, to seek relief against persons, entities, and ***foreign countries, wherever acting*** and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

Congress could not have been clearer in its statement that providing civil remedies for American victims of terror takes precedence over comity or any other justifications for foreign sovereign immunity.

Grace and comity may be the motivation behind foreign sovereign immunity. But, as JASTA demonstrates, they do not necessarily resolve all questions of immunity to the detriment of other important values. Both the State Department and the courts have denied foreign sovereign immunity to protect American national interests and to ensure that other nations recognize those interests. See e.g., *Alfred Dunhill*, 425 U.S.

at 700. And, both the State Department and the courts have denied foreign sovereign immunity to uphold the interests of an injured private party at the expense of comity. See e.g., *id.* at 705 n.18; see also *id.* at 706-711 (Appendix 1 Opinion of the Court, Letter of Monroe Leigh, Legal Advisor, Department of State, dated Nov. 26, 1975).

In *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), the court explained one rationale behind the restrictive view of foreign sovereign immunity:

> The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.

The court emphasized the interest of vindication of private rights as a counter-weight to the risk of offending the foreign sovereign. *Id.* The restrictive theory rejected the idea that comity, alone, should be determinative.

Perhaps the prime pre-FSIA example of the government placing the interests of injured private parties over the interests of comity is *Bernstein v. N.V. Nderlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), a case decided under

the act of state doctrine.[5] There, the Second Circuit amended its mandate to allow an action to proceed after the State Department issued a letter and press release establishing a new policy that placed the rights of victims of Nazi confiscations over the interests of international comity. The State Department letter, was issued years after the end of World War II, at a time when the United States enjoyed peaceful relations with Germany. It relieved "American courts from ***any restrain[t] upon the exercise of their jurisdiction*** to pass upon the validity of the acts of Nazi officials." (emphasis supplied). The shift in the State Department's position was not based upon the commercial or financial characteristic of the Nazi confiscations, but upon the "Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. . . ." *Id.* The withdrawal of restraint on the exercise of jurisdiction expressed in the State Department letter was absolute. It demonstrates that when the policy-making branches of government determine that comity should give way to other important values, their power to do so is unlimited.

2. Congress enacted the original terrorism exception to foreign sovereign immunity, 28 U.S.C.

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[5] Similar policy concerns relating to comity and international relations inform court decisions under the act of state doctrine and foreign sovereign immunity. See *Alfred Dunhill*, 425 U.S. at 708-709, Appendix I to Opinion of the Court.

§ 1605(a)(7), to provide American citizens with "an important economic and financial weapon" against designated state sponsors of terrorism, which Congress deemed, "outlaw states." *Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016), *quoting* H.R. Rep. No. 104-383, at 62 (1995). Unlike the original immunity exceptions, which were largely codifications of common law exceptions, the 1996 terrorism jurisdictional immunity exception was original.

The terrorism exception can be viewed either as an abrogation of foreign sovereign immunity or as an ***application*** of an expansive view of the restrictive theory of sovereign immunity. See Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?* The European Journal of International Law, Vol. 21, No. 4, 860-861 (2010) (observing that customary international law is increasingly tolerant of expansive applications of the restrictive theory of foreign sovereign immunity that include claims for massive human rights violations, torture, property destruction, mass killings of civilians during armed conflict, slave labor, and, of course, terrorism.). The *Bernstein* case discussed above and the State Department letter upon which it was based (discussed in the previous section) were examples of an expansive application of the restrictive view of foreign sovereign immunity. The expansive terrorism exception to foreign sovereign immunity could certainly find a precedent in *Bernstein*.

Alternatively, the terrorism exception could also be viewed as a justifiable departure from traditional

notions of foreign sovereign immunity. Congress has unmistakably decided that state sponsorship of terrorism represents "a certain category of sovereign act[]" that is so "repugnant to the United States and the international community" that it does not deserve immunity. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 2009).

Viewed in either light, holding state sponsors of terrorism to different standards than law-abiding states is a legitimate expression of Congressional authority, under both domestic and international law. "Congress has the power to withhold the privilege of jurisdictional immunity from foreign states that sponsor terrorist acts and to treat their property differently." *Ministry of Defense*, 984 F. Supp. 2d at 1095-1096.

3. Indeed, as a matter of policy, there is no reason why "grace and comity" should defeat claims of American victims of state-sponsored terrorism. "[T]errorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis* – an enemy of all mankind. . . ." *Flatow*, 999 F. Supp. at 23. The First Circuit has described terrorism as "the modern-day equivalent of the bubonic plague: it is an existential threat." *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013).

> [Terrorism] has become the insidious method by which certain rogue states operate to influence the international community, outside the

> normal bounds of international communication. No nation openly professes to support the use of terrorist methods, though several clandestinely do. Although there are traditional methods of effecting change on the world stage – including diplomacy, trade and economic sanctions, and even the use of organized armed conflict under established international rules of war – certain states instead choose to conduct their policy through naked violence directed at individuals. In such circumstances, "traditional notions of fair play and substantial justice" are stretched to the limits.

For more than three decades, Iran has been among the most active state sponsors of terrorism. In an argument that the district court for the Northern District of Illinois deemed "more than outrageous," Iran asserted that it was ***justified*** in its continuing support of terrorism and extrajudicial killing of Americans, in taking over the United States embassy in Tehran and holding 52 American diplomats and citizens hostage for more than one year, bombing the United States marine barracks in Beirut, Lebanon in 1983 killing 241 American servicemen, and in carrying out and supporting countless acts of terrorism. *Rubin v. Islamic Republic of Iran*, Case No. 03-Civ-9370 (N.D. Ill.) Dkt. No. 656-10 at 10-21 (August 22, 2008).

To borrow a phrase from the district judge, treating Iran with grace and comity is "more than outrageous." Through § 1083, Congress has clearly expressed it intent to distinguish Iran and the other

designated state sponsors of terrorism and to hold them civilly liable to their American victims. As Judge Hamilton wrote in his dissent from the denial of rehearing *en banc*:

> We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are undeserving beneficiaries of the unusual steps taken by the Rubin panel.

Pet.App. 42.

B. Section 1083 of the NDAA of 2008 manifests a clear legislative intent to enable terrorism victims to enforce their terrorism judgments to the fullest extent.

In § 1083, Congress introduced several far-reaching innovations in foreign sovereign immunity jurisprudence. These innovations include, among others, the creation of a private right of action targeting the actions of the foreign state, § 1605A(c); the imposition of punitive damages, § 1605A(d); the automatic imposition of a pre-judgment lien of *lis pendens* on practically all assets of the sovereign defendant or those of any entity controlled by the defendant, § 1605A(g); and the abrogation of res judicata, collateral estoppel, and limitations periods specifically designed to empower terrorism victims to compound their claims and damages awards, at the expense of the foreign state defendants. Any one of these innovations standing alone would be

considered a serious affront to the dignity of a sovereign defendant. Congress was not concerned about affronting Iran's dignity.

The numerous unique provisions of § 1083 clearly manifest Congress's intent to both compensate terrorism victims and to punish Iran. Construing subsection 1610(g) as a comprehensive execution provision reaching nearly all foreign state property is entirely consistent with the entirety of § 1083. As the D.C. Circuit held in *Weinstein*, 831 F.3d at 483 (D.C. Cir. 2016), "the terrorist activity exception is, simply put, different" from other FSIA execution immunity exceptions. The *Weinstein* court, therefore, construed subsection 1610(g) to "strip[] execution immunity from ***all*** property of a defendant sovereign." *Id.* (emphasis in original).

Section 1610(g) was specifically intended to remove the remaining obstacles to terrorism judgment enforcement. See *Bank Markazi*, 136 S. Ct. 1318 n.2. It followed several unsuccessful attempts to empower terrorism judgment creditors to enforce their judgments. The Ninth Circuit in *Bennett* found persuasive a House Conference Report stating that the new law would subject to execution "any property in which the foreign state has a beneficial ownership." *Bennett III*, 825 at 962, *quoting* H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). And, it quoted one of the sponsors of a predecessor bill that became subsection 1610(g) as saying foreign state defendants are subject to attachment based upon "the satisfaction of a simple ownership test." See *id.*, *quoting* 154 Cong. Rec. S54-01 (Jan.

22, 2008) (statement of Sen. Lautenberg). Other courts agree. "[A] core purpose of [subsection 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heiser*, 807 F. Supp. 2d at 26; see also *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016).

This "core purpose" can only be satisfied if subsection 1610(g) is correctly understood and uniformly applied. As Judge Hamilton wrote in his dissent from the denial of *en banc* review, the Seventh Circuit's erroneous and narrow construction of subsection 1610(g) "has important practical consequences." App. 39. Most important, the *Rubin* panel's reading of subsection 1610(g) restricts rather than expands the availability of assets for post-judgment execution. App. 39. Thus, the Seventh Circuit would return plaintiffs to the "long, bitter, and often futile quest for justice" that plagued them before Congress enacted 1610(g). See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009).

C. The Seventh Circuit's construction of subsection 1610(g) as requiring satisfaction of strict commercial use requirements is not consistent with Congress's clear intent to expand the possibilities for enforcement of terrorism Judgments.

One of the most formidable impediments to satisfaction of judgments against foreign states, generally,

is the commercial use requirement of subsection 1610(a). See Statement of the Case, section A.2, supra. The difficulty in satisfying this provision lies more in the "use" element than in the "commercial" element. Proceeds of commercial transactions found in a foreign state bank account may be immune because the foreign state did not ***use*** the money; it received the money. See *CBC*, 309 F.3d 240, 256 n.5. Under the decisions interpreting subsection 1610(a), seemingly, almost any passive account would not satisfy the "use" element. See Statement of the Case, Section A.2, supra. Of course, once a foreign state ***uses*** its money, the money is no longer available for the state's judgment creditors.

Superimposing the commercial use elements of subsection 1610(a) on enforcement of terrorism judgments under subsection 1610(g) would dramatically limit the intended benefits of the statute. In the instant case, the courts below held that the Iranian Artifacts were immune only because Iran, itself, did not use them. The Artifacts bear no characteristics of prototypically sovereign property. Private parties are as likely as sovereign states to own and use artifacts.

Similarly, in *Bennett*, the judgment creditors seek to execute their judgment against funds owed to Bank Melli, an agency of Iran. Those funds appear to be under the control of the interpleader plaintiffs. Requiring the *Bennett* parties to satisfy subsection (a) to enforce their judgment under subsection (g) would serve no purpose other than to defeat their efforts. Bear in mind, these funds are blocked, so Iran cannot

"use" them. And any affront to the dignity of Iran, to the extent it should matter, already occurred when the government blocked the assets. The same is true for the bank accounts that were at issue in *Gates*, 755 F.3d 568. And, in *Ministry of Defense*, 984 F. Supp. 2d 1070, the court applied the broad construction of subsection 1610(g), to allow the plaintiffs to seize a judgment that the Iranian Ministry of Defense had won against a defense contractor. That decision was affirmed on other grounds. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053 (9th Cir. 2016).

Without the benefits of the broad construction of subsection 1610(g), *Bennett*, *Gates*, and *Ministry of Defense* would all likely have turned out like *Rubin*, below. That result defies the core purpose of subsection 1610(g), which, as this Court recognized in *Bank Markazi*, 136 S. Ct. 1317-1318 (2016), was to free terrorism judgment creditors from the "practical and legal difficulties" that obstructed their enforcement efforts. The most prominent of these difficulties, and the one that, in 1998, first motivated Congress to legislate a solution was the commercial use requirement. See *id.*

The Seventh Circuit's construction of subsection 1610(g) would ensure that terrorism plaintiffs enforce their judgments only against property used for commercial activity by the foreign state itself, "as provided in" ***subsection*** 1610(a)(7). This construction defeats the purpose of subsection 1610(g) and § 1083 of the

NDAA of 2008, and would set back by twenty years terrorism judgment creditors' prospects of enforcing their judgments.

CONCLUSION

The Court should overrule the Seventh Circuit's holding as to subsection 1610(g) with instructions to enter judgment in favor of the petitioners.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of

law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) [Repealed]

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional immunity for certain art exhibition activities.

(1) In general. If –

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.

(A) Nazi-era claims. Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and –

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works. In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and –

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court

to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions. For purposes of this subsection –

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means –

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.

(1) No immunity. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard. The court shall hear a claim under this section if –

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 [note to this section] or is filed under this section by reason of section 1083(c)(3) of that Act [note to this section], the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section [enacted Jan. 28, 2008]) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of

an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations. An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action. A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages. After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.

(1) In general. The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds. The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal. In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.

(1) In general. In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice. A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability. Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions. For purposes of this section –

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1605B. Responsibility of foreign states for international terrorism against the United States

(a) Definition. In this section, the term "international terrorism" –

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in that section).

(b) Responsibility of foreign states. A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by –

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

(c) Claims by nationals of the United States. Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

(d) Rule of construction. A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable

international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been

taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property

is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)

(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state

is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign

state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Public Law 110-181
110th Congress

An Act

To provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TREATMENT OF EXPLANATORY STATEMENT.

(a) SHORT TITLE. – This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2008".

(b) EXPLANATORY STATEMENT. – The Joint Explanatory Statement submitted by the Committee of Conference for the conference report to accompany H.R. 1585 of the 110th Congress (Report 110-477) shall be deemed to be part of the legislative history of this Act and shall have the same effect with respect to the implementation of this Act as it would have had with

respect to the implementation of H.R. 1585, if such bill had been enacted.

* * *

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL. –

"(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD. – The court shall hear a claim under this section if-

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the

time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is reified under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting

within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104208) not later than the latter of –

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS. –

"(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION. –

"(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled

by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS. – For purposes of this section –

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS. –

(1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS. – Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY. – Section 1610 of title 28, United States Code, is amended –

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS. –

"(1) IN GENERAL. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to

attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of-

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS. –

(A) IN GENERAL. – With respect to any action that –

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED. – The defenses of res judicata, collateral estoppel, and limitation period are waived –

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS. – A motion may be made or an action may be refiled under subparagraph (A) only –

(i) if the original action was commenced not later than the latter of –

(I) 10 years after April 24,1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS. – If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after –

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS. – Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11,117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ. –

(1) APPLICABILITY. – The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that –

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE. – The authority under paragraph (1) shall apply –

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS. – A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS. – It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY. – If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to

other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

In the Senate of the United States,

October 1, 2007.

Resolved, That the bill from the House of Representatives (H.R. 1585) entitled "An Act to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.", do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2008".

* * *

SEC. 1087. JUSTICE FOR MARINES AND OTHER VICTIMS OF STATE-SPONSORED TERRORISM ACT.

(a) SHORT TITLE. – This section may be cited as the "Justice for Marines and Other Victims of State-Sponsored Terrorism Act".

(b) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting of section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL. –

"(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD. – The court shall hear a claim under this section if –

"(A) the foreign state was designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later designated as a result of such act;

"(B) the claimant or the victim was –

"(i) a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(ii) a member of the Armed Forces of the United States (as that term is defined in section 976 of title 10); or

"(iii) otherwise an employee of the government of the United States or one of its contractors acting within the scope of their employment when the act upon which the claim is based occurred; or

"(C) where the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.

"(b) DEFINITION. – For purposes of this section –

"(1) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note);

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

"(3) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

"(c) TIME LIMIT. – An action may be brought under this section if the action is commenced not later than the latter of –

"(1) 10 years after April 24, 1996; or

"(2) 10 years from the date on which the cause of action arose.

"(d) PRIVATE RIGHT OF ACTION. – A private cause of action may be brought against a foreign state designated under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405(j)), and any official, employee, or agent of said foreign state while acting within the scope of his or her office, employment, or agency which shall be liable to a national of the United States (as that term is defined in section 101(a) (22) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (22)), a member of the Armed Forces of the United States (as that term is defined in section 976 of title 10), or an employee of the government of the United States or one of its contractors acting within the scope of their employment or the legal representative of such a person for personal injury or death caused by acts of that foreign state or its official, employee, or agent for which the courts of the United States may maintain jurisdiction under this section for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in this section. A foreign state shall be vicariously liable for the actions of its officials, employees, or agents.

"(e) ADDITIONAL DAMAGES. – After an action has been brought under subsection (d), actions may also be

brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and life and property insurance policy loss claims.

"(f) SPECIAL MASTERS. –

"(1) IN GENERAL. – The Courts of the United States may from time to time appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under sections 1404C of the Victims Crime Act of 1984 (42 U.S.C. 10603c) to the Administrator of the United States District Court in which any case is pending which has been brought pursuant to section 1605(a)(7) such funds as may be required to carry out the Orders of that United States District Court appointing Special Masters in any case under this section. Any amount paid in compensation to any such Special Master shall constitute an item of court costs.

"(g) APPEAL. In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(h) PROPERTY DISPOSITION. –

"(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of

lis pendens upon any real property or tangible personal property located within that judicial district that is titled in the name of any defendant, or titled in the name of any entity controlled by any such defendant if such notice contains a statement listing those controlled entities.

"(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The chapter analysis for chapter 97 of title 28, United States Code, is amended by inserting after the item for section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(c) CONFORMING AMENDMENTS. –

(1) PROPERTY. – Section 1610 of title 28, United States Code, is amended by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS. –

"(1) IN GENERAL. – The property of a foreign state, or agency or instrumentality of a foreign state, against which a judgment is entered under this section, including property that is a separate

juridical entity, is subject to execution upon that judgment as provided in this section, regardless of –

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from execution upon a judgment entered under this section because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.".

(2) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988, with respect to which an investigation or" and inserting "October 23, 1983, with

respect to which an investigation or civil or criminal".

(3) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5) (B), by inserting "or" after the semicolon;

(ii) in paragraph (6) (D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7); and

(B) by striking subsections (e) and (f).

(d) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A or 1605(g) of title 28, United States Code, as added by this section.

(2) PRIOR ACTIONS. – Any judgment or action brought under section 1605(a)(7) of title 28, United States Code, or section 101(c) of Public Law 104-208 after the effective date of such provisions relying on either of these provisions as creating a cause of action, which has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action opposable against the state, and which is still before the courts in any form, including appeal or motion under Federal Rule of Civil Procedure 60(b), shall, on motion made to the Federal District Court where the judgment or action was initially entered, be given effect as if it had originally been filed pursuant to section

1605A(d) of title 28, United States Code. The defenses of res judicata, collateral estoppel and limitation period are waived in any re-filed action described in this paragraph and based on the such claim. Any such motion or re-filing must be made not later than 60 days after enactment of this Act.

RECORD AND BRIEFS

No. 16-534

NOV 23 2016

IN THE

Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MEMORANDUM IN RESPONSE FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

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QUESTIONS PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Section 1610(g) of the Foreign Sovereign Immunities Act provides that, for terrorism judgments, "property of a foreign state" and "property of an agency or instrumentality of such a state" are subject to "execution * * * *as provided in this section*, regardless of" five factors associated with *Bancec*. 28 U.S.C. §1610(g) (emphasis added). Section 1610(a) denies immunity to certain "property in the United States of a foreign state * * * used for a commercial activity in the United States." *Id.* §1610(a). The questions presented are:

1. Whether §1610(g) establishes a freestanding exception to sovereign immunity, as the Ninth Circuit has held, or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in §1610, as the Seventh Circuit held below and the United States has repeatedly urged.

2. Whether the Seventh Circuit correctly held, consistent with every other court of appeals that has addressed the issue, that §1610(a) denies immunity only where property is used for a commercial activity in the United States by the sovereign itself, and not merely by a third party.

TABLE OF CONTENTS

	Page
Statement	3
I. Statutory Framework	3
A. The Foreign Sovereign Immunities Act	3
B. The Terrorism Amendments to the FSIA	5
II. Proceedings Below	9
A. Proceedings in the District Court	9
B. The Court of Appeals' Decision	11
Argument	14
I. The Proper Construction of § 1610(g) Is an Important Question That Has Divided the Courts of Appeals	14
A. The Circuits Are Divided	14
B. The Seventh Circuit's Decision Is Correct	17
II. The Second Question Presented Does Not Warrant Review	21
A. There Is No Circuit Conflict over the Proper Interpretation of § 1610(a)	21
B. The Seventh Circuit's Decision Is Correct	23
C. This Case Is a Poor Vehicle for Addressing the Issue	25
Conclusion	26

TABLE OF AUTHORITIES

Page(s)

CASES

Af-Cap, Inc. v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007) 22

Aurelius Capital Partners, L.P. v. *Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009)..... 22

Bank Markazi v. *Peterson*, 135 S. Ct. 1753 (2015)..... 17

Bank Melli Iran N.Y. Representative Office v. *Weinstein*, 131 S. Ct. 3012 (2011)..... 17

Bennett v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016)..... 13, 15, 16, 17

Calderon-Cardona v. *Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014)..... 16

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010)..... 24

Conn. Bank of Commerce v. *Republic of Congo*, 309 F.3d 240 (5th Cir. 2002)..... 21, 22

De Letelier v. *Republic of Chile*, 748 F.2d 790 (2d Cir. 1984)..... 25

First Nat'l City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)..... *passim*

Flatow v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002)..... 5, 8

Heiser v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) 16

Kirschenbaum v. *650 Fifth Ave.*, 830 F.3d 107 (2d Cir. 2016) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 24

Rubin v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012) 17

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983) 3, 23

Weinstein v. *Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016) 15

STATUTES

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 ..... *passim*

28 U.S.C. § 1602 ..... 3, 11, 23

28 U.S.C. § 1603(d) 26

28 U.S.C. § 1604 3

28 U.S.C. § 1605 3

28 U.S.C. § 1605(a)(2) 3, 24

28 U.S.C. § 1605(a)(3) 24

28 U.S.C. § 1605(a)(7) ..... *passim*

28 U.S.C. § 1605A ..... *passim*

28 U.S.C. § 1609 4

28 U.S.C. § 1610 4

28 U.S.C. § 1610(a) ..... *passim*

28 U.S.C. § 1610(a)(2) 4

28 U.S.C. § 1610(a)(7) ..... *passim*

28 U.S.C. § 1610(b) 4, 25

28 U.S.C. § 1610(b)(3) ..... *passim*

28 U.S.C. § 1610(f) 13, 17, 18

28 U.S.C. § 1610(f)(1) 6

28 U.S.C. § 1610(f)(1)(A) 6

28 U.S.C. § 1610(f)(3) 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610(g) ..... *passim*
28 U.S.C. § 1610(g)(1)..... *passim*

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 5

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998):
§ 117, 112 Stat. at 2681-491 6
§ 117(d), 112 Stat. at 2681-492..... 6

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464:
§ 2002(f)(1)(B), 114 Stat. at 1543..... 7
§ 2002(f)(2), 114 Stat. at 1543..... 6

Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337..... *passim*
28 U.S.C. § 1610 note 7
28 U.S.C. § 1610 note § 201(a)..... 7, 16
28 U.S.C. § 1610 note § 201(d)(2)(B)(ii)..... 20

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:
§ 1083, 122 Stat. at 338..... 7
§ 1083(b)(3)(A), 122 Stat. at 341..... 7, 18, 19
§ 1083(b)(3)(B), 122 Stat. at 341..... 7, 18, 19

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260..... 7, 19

TABLE OF AUTHORITIES—Continued

Page(s)

TREATY PROVISIONS

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Art. 19(c) 24
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LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487 (1976) 4, 23

EXECUTIVE MATERIALS

63 Fed. Reg. 59,201 (Oct. 21, 1998) 6

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OTHER AUTHORITIES

U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442 (9th Cir. filed Oct. 23, 2015) 15

U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582 (2d Cir. filed Nov. 4, 2011) 15

U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182 (9th Cir. filed July 3, 2014) 15

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610(g) ..... *passim*
28 U.S.C. § 1610(g)(1)..... *passim*

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§ 117, 112 Stat. at 2681-491 6
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28 U.S.C. § 1610 note § 201(a) 7, 16
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§ 1083, 122 Stat. at 338..... 7
§ 1083(b)(3)(A), 122 Stat. at 341..... 7, 18, 19
§ 1083(b)(3)(B), 122 Stat. at 341..... 7, 18, 19

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TABLE OF AUTHORITIES—Continued

Page(s)

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U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182 (9th Cir. filed July 3, 2014) 15

IN THE

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NO. 16-534

JENNY RUBIN, *et al.*,

Petitioners,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM IN RESPONSE FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

Respondent Islamic Republic of Iran agrees with petitioners that there is a conflict in the circuits on the first question presented. Iran also agrees that the question is important. In *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016), Bank Melli—an instrumentality of the Islamic Republic of Iran—has sought review of a Ninth Circuit decision addressing that same question. In that case, the Ninth Circuit ruled that §1610(g) is a free-standing exception to immunity. In this case, the Seventh Circuit expressly rejected that conclusion, ruling that §1610(g) merely supersedes the *Bancec* presumption, allowing execution against assets under the FSIA's

existing immunity exceptions without regard to an entity's separate status.

The petition in this case and the petition in *Bank Melli* thus present the same important question. *Bank Melli*, however, also raises a second question on which the circuits are divided—whether TRIA and §1610(g) impose an ownership requirement. Accordingly, the Court should grant review in *Bank Melli* and hold this case pending its disposition of that case. Alternatively, the Court should grant both petitions and consolidate the cases for argument. Finally, the Court may also wish to invite the Solicitor General to express the views of the United States in both cases.

The second question presented in this case, by contrast, does not warrant review. Petitioners urge that the FSIA's "commercial activity" exception to execution immunity applies whenever property is used in the United States for a commercial activity, regardless of who uses the property. But the Seventh Circuit, like every other circuit that has addressed the issue, has come to the opposite conclusion—that the exception applies only to property used for a commercial activity in the United States *by the foreign state*. Petitioners dispute the Seventh Circuit's construction of the cases it relied on. But any ambiguity is beside the point: It is uncontested that *no* circuit has adopted petitioners' construction. Besides, this case is a poor vehicle. As the court of appeals recognized, petitioners would likely lose even under their own interpretation. Accordingly, the Court should deny review of the second question presented.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity to a state's "strictly commercial" acts. See *id.* at 486-487. Two decades later, Congress enacted the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§1602 *et seq.*), which largely codifies that restrictive theory. As the Act's findings and declaration of purpose explain, "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. §1602.

1. The FSIA addresses both the immunity of foreign sovereigns from suit and the immunity of sovereign property from attachment and execution. With respect to immunity from suit, the FSIA preserves the general rule that "a foreign state [or agency or instrumentality] shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. §1604. Section 1605 then lists carefully circumscribed exceptions to that jurisdictional immunity. *Id.* §1605. For example, under the Act's "commercial activity" exception, a foreign sovereign is not immune from an action "based upon a commercial activity carried on in the United States by the foreign state." *Id.* §1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Before the FSIA's enactment, sovereign property "enjoy[ed] absolute immunity from execution," even under the restrictive theory of immunity. H.R. Rep. No. 94-1487, at 8 (1976). Plaintiffs who obtained judgments against foreign sovereigns thus had to rely on sovereign grace for their satisfaction. *Ibid.* The FSIA retains the general rule that "property in the United States of a foreign state [or agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. §1609. But the Act provides limited exceptions in §1610.

Section 1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States" is not immune from execution if one of certain additional conditions set forth in that section applies. 28 U.S.C. §1610(a). Under §1610(a)(2), for example, property of a foreign state used for a commercial activity in the United States is subject to execution if the property "is or was used for the commercial activity upon which the claim is based." *Id.* §1610(a)(2). Section 1610(b) provides additional exceptions for property of sovereign agencies or instrumentalities. Such property is subject to execution if the agency or instrumentality is "engaged in commercial activity in the United States" and one of certain additional conditions applies. *Id.* §1610(b). Thus, consistent with the restrictive theory, both §1610(a) and §1610(b) require commercial activity.

2. As a general matter, the FSIA does not address when a sovereign's agencies or instrumentalities may be held liable for judgments against the sovereign itself. This Court resolved that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462

U.S. 611 (1983) ("*Bancec*"). *Bancec* explained that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620. Instead, such matters are governed by substantive international and federal common law. *Id.* at 626-627. Applying that substantive law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Ibid.*

Bancec identified two limited exceptions to that presumption of separate treatment: first, where the sovereign and instrumentality are alter egos; and second, where the sovereign abuses the corporate form to "'work fraud or injustice.'" 462 U.S. at 629-630. In the wake of *Bancec*, some courts developed five "factors" to determine whether *Bancec*'s presumption of separate status has been overcome. See, *e.g.*, *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002).

B. The Terrorism Amendments to the FSIA

Over the last two decades, Congress has repeatedly amended the FSIA in connection with terrorism claims.

1. In 1996, Congress enacted a new exception to jurisdictional immunity for terrorism claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. §1605(a)(7)). That exception denied immunity for suits against certain sovereigns for acts of terrorism or material support for such acts. *Ibid.*

The 1996 amendments also created new exceptions to attachment and execution immunity for judgments in terrorism cases. Section 1610(a)(7) provides that "[t]he property in the United States of a foreign state * * * used

for a commercial activity in the United States" is subject to execution to satisfy a terrorism judgment, "regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) provides a similar exception for agencies and instrumentalities. *Id.* § 1610(b)(3).

2. Two years later, Congress added another exception for assets the Executive Branch had "blocked" under economic sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998). Codified as § 1610(f)(1), it provides:

> Notwithstanding any other provision of law, * * * any property with respect to which financial transactions are prohibited or regulated pursuant to [various statutes] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune under section 1605(a)(7) * * * .

28 U.S.C. § 1610(f)(1)(A).

Congress authorized the President to waive the execution mechanism in subsection (f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately issued a blanket waiver, finding that the provision "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2000, Congress repealed the provision authorizing that waiver. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543. In light of Executive Branch opposition

to the provision's elimination, however, Congress added a new waiver provision to the bill before its enactment. See *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)). The President then promptly issued another blanket waiver under that new provision. 65 Fed. Reg. 66,483 (Oct. 28, 2000).

3. In 2002, Congress enacted § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note). As amended, § 201(a) provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) * * * , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment * * * .

28 U.S.C. § 1610 note § 201(a).

4. In 2008, Congress again amended the FSIA's terrorism provisions. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. That statute revised § 1605(a)(7)'s exception to jurisdictional immunity and recodified it as § 1605A. See 28 U.S.C. § 1605A. The statute also amended the execution immunity exceptions in § 1610(a)(7) and (b)(3) to permit execution of § 1605A judgments under those provisions. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008), amended by Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012).

Finally, the 2008 amendments added a new provision addressing execution, codified as 28 U.S.C. § 1610(g). That provision states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section, regardless of*—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1) (emphasis added). The five factors in paragraphs (A) through (E) are the same five "*Bancec* factors" that some courts had used to determine whether a plaintiff had overcome *Bancec*'s presumption of separate status. See, *e.g.*, *Flatow*, 308 F.3d at 1071 n.9.

II. PROCEEDINGS BELOW

Petitioners are American citizens injured in a 1997 terrorist attack in Jerusalem. Pet. App. 5a. They filed suit against the Islamic Republic of Iran, alleging that it had provided support to Hamas, the organization that carried out the attack. *Id.* at 5a-6a. In 2003, they obtained a default judgment against Iran. *Id.* at 6a.

A. Proceedings in the District Court

Petitioners commenced this enforcement action in an effort to collect on that default judgment. They sought to execute against four collections of ancient Persian artifacts in the possession of the Oriental Institute of the University of Chicago and the Field Museum of Natural History. Pet. App. 6a.

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments "containing some of the oldest writings in the world." Pet. App. 4a-5a. In 1937, Iran loaned that collection to the Oriental Institute for research, translation, and cataloguing. *Ibid.* The Chogha Mish Collection consists of clay seal impressions that Iran excavated from the ancient Chogha Mish settlement in the 1960s and then loaned to the Oriental Institute for academic study. *Id.* at 5a. The Herzfeld Collection includes approximately 1200 prehistoric artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archaeologist who worked in Persia. *Ibid.* And the Oriental Institute Collection contains Persian artifacts donated by Iran and other donors. *Ibid.*[1]

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[1] The Chogha Mish artifacts were returned to Iran following the district court's decision and the denial of a stay pending appeal, and Iran has disclaimed any ownership of the Herzfeld and Oriental Institute Collections. Pet. App. 8a-10a. Consequently, only the Persepolis Collection remains at issue in this litigation. *Id.* at 10a.

The district court granted summary judgment to Iran and the museums. Pet. App. 43a-71a. The court first held that petitioners could not attach the antiquities under the commercial activity exception of § 1610(a). *Id.* at 50a-57a. Petitioners claimed that that exception applied because the *museums* had allegedly used the artifacts for commercial purposes. *Id.* at 51a. But the court held that § 1610(a) "requires the commercial activity to be conducted *by the sovereign*." *Id.* at 57a (emphasis added). Petitioners did not contend that *Iran* made any commercial use of the artifacts. *Id.* at 51a. Given that holding, the court did not reach Iran's alternative argument that "the acts performed by the Institute in the course of studying and displaying the artifacts [did not] constitute 'commercial activity.'" *Id.* at 51a, 57a n.10.

The district court also held that petitioners could not execute against the antiquities under § 1610(g). Pet. App. 57a-62a. "Section 1610(g)," the court held, "is not a separate basis of attachment." *Id.* at 61a. Rather, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* at 62a. Because § 1610(g) was not an independent exception to immunity, the provision "d[id] not subject the collections in question to attachment and execution." *Ibid.*[2]

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[2] The district court also held that petitioners could not attach the antiquities under TRIA because the antiquities were not "blocked assets." Pet. App. 62a-70a. The Seventh Circuit agreed, *id.* at 35a-38a, and petitioners do not challenge that ruling.

B. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-42a.

1. The court of appeals first rejected petitioners' claim that the artifacts were subject to execution under §1610(a). The parties disputed both whether "*a third party's* commercial use of the property triggers §1610(a)" and whether "the University's academic study of the Persepolis Collection counts as a commercial use." Pet. App. 16a. The court was "skeptical that academic study qualifies as a commercial use." *Ibid.* But it declined to reach that issue because it agreed with Iran that only the *sovereign's* commercial use matters. *Id.* at 16a-21a.

On that issue, the court noted, "[t]he United States has weighed in as an amicus curiae on the side of the interpretation urged by Iran and the University—namely, that the exception in §1610(a) applies *only* when the foreign sovereign itself (not a third party) uses the property for a commercial activity." Pet. App. 16a. Three other circuits, the court observed, have agreed with that position. *Id.* at 16a-17a. That interpretation also accords with the FSIA's declaration of purpose, which states that sovereigns "'are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities.'" *Id.* at 17a (quoting 28 U.S.C. §1602) (emphasis in opinion). The court thus "join[ed] the emerging consensus of [its] sister circuits" and held that "§1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." *Id.* at 20a.

2. The court of appeals also rejected petitioners' contention that the artifacts were subject to execution under §1610(g). Petitioners argued that §1610(g) was "a free-

standing exception to execution immunity for terrorism-related judgments." Pet. App. 22a. Iran and the museums, by contrast, urged that the provision merely "abrogat[ed] the *Bancec* doctrine for § 1605A judgments" and was "not itself an exception to execution immunity." *Ibid.* Once again, "[t]he United States support[ed] this interpretation and join[ed] Iran and the University in urging [the court] to adopt it." *Ibid.*

The court agreed with that interpretation. By its plain terms, the court observed, "subsection (g) permits a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state *and* the property of its agency or instrumentality '*as provided in this section*' but '*regardless of*' the five [*Bancec*] factors." Pet. App. 25a (quoting 28 U.S.C. § 1610(g)(1)) (emphasis in opinion). As the court noted, the phrase "as provided in this section" "makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity." *Id.* at 27a. Petitioners' interpretation thus "violates the 'cardinal principle' that a statute should be interpreted to avoid superfluity." *Ibid.*

Petitioners' interpretation also "creates superfluities in other parts of the statute." Pet. App. 27a. Subsections 1610(a)(7) and (b)(3) already provide for execution of terrorism judgments where certain commercial activity requirements are met. *Id.* at 27a-28a (citing 28 U.S.C. § 1610(a)(7), (b)(3)). "If subsection (g) paves a dedicated lane for all execution actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all." *Id.* at 27a-28a. That result is particularly improbable because Congress amended § 1610(a)(7) and (b)(3) at the same time it enacted § 1610(g) in 2008—amendments that would have been pointless if petitioners' construction of § 1610(g) were correct. *Id.* at 28a n.5.

The Seventh Circuit noted that the Ninth Circuit had reached a contrary result in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016). Pet. App. 32a-33a. The Ninth Circuit, it observed, "purported to explain away the 'as provided in this section' language in subsection (g) by interpreting it to apply only to § 1610(f)." *Id.* at 33a. The Seventh Circuit rejected that construction as a "highly strained interpretation" because "it implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" *Ibid.*

"Second, and importantly," the court added, "§ 1610(f) *never became operative*"—the President issued a blanket waiver the day it was enacted. Pet. App. 33a. As a result, § 1610(f) "does not allow *any* form of execution." *Id.* at 34a. "It therefore makes no sense to say, as the *Bennett* majority does, that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

For those reasons, the Seventh Circuit "disagree[d] with the Ninth Circuit's interpretation of subsection (g)." Pet. App. 34a. The court noted that the Ninth Circuit, in reaching its contrary view, had relied on two earlier Seventh Circuit cases. *Ibid.* Those cases, the Seventh Circuit explained, merely "assume[ ] rather than decide[ ] the crucial antecedent question—that is, whether § 1610(g) is itself a freestanding exception to execution immunity." *Id.* at 30a. "To the extent that [those cases] can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments," the court held, "they are overruled." *Id.* at 34a-35a.

Because the court's decision "overrule[d] circuit precedent and create[d] a conflict with the Ninth Circuit," the panel circulated its opinion to all active judges, several of whom were recused. Pet. App. 35a n.6. A majority of the court did not vote to rehear the case en banc. *Ibid.* Judge Hamilton dissented. *Id.* at 39a-42a.

ARGUMENT

Respondent agrees that the proper interpretation of § 1610(g) is an important question that has divided the courts of appeals. That question is pending in both this case and in *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016). The petition in *Bennett*, moreover, raises a second important question on which the circuits are also divided. Accordingly, the Court should grant review in that case and hold this case pending its disposition of that case. Alternatively, if the Court is inclined to grant review in this case, it should grant both petitions and consolidate the cases for argument.

By contrast, the second question presented in this case, concerning the proper construction of § 1610(a), does not warrant review. Four circuits now agree that § 1610(a) requires commercial activity by the sovereign, not merely by third parties. Petitioners identify no court that has ever adopted their interpretation. And this case is a poor vehicle for addressing the issue because petitioners would not prevail even under their own mistaken interpretation.

I. THE PROPER CONSTRUCTION OF § 1610(g) IS AN IMPORTANT QUESTION THAT HAS DIVIDED THE COURTS OF APPEALS

A. The Circuits Are Divided

1. As the petition correctly explains, the circuits are divided over the proper construction of § 1610(g). The

conflict could not be starker. The Seventh Circuit held below that §1610(g) "is *not* a freestanding terrorism exception to execution immunity." Pet. App. 4a (emphasis added). Just a month earlier, however, the Ninth Circuit reached the opposite conclusion, holding that "§1610(g) *is* a freestanding provision for attaching and executing against assets." *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 960 (9th Cir. 2016) (emphasis added). The question was thoroughly considered in both circuits: It generated three different opinions in the Ninth Circuit (two with dissents), as well as a dissent from denial of rehearing en banc in the Seventh Circuit. Pet. 22.

Two other circuits have also recently agreed with the Ninth Circuit's position, albeit with no analysis. See *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016); *Kirschenbaum* v. *650 Fifth Ave.*, 830 F.3d 107, 123 (2d Cir. 2016). By contrast, the Executive Branch has repeatedly agreed with the Seventh Circuit's position, filing amicus briefs advocating that interpretation in this case, in *Bank Melli*, and in two other cases. See C.A. Dkt. 54, at 23 (filed Nov. 3, 2014); U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, at 8 (9th Cir. filed Oct. 23, 2015); U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182, at 29 (9th Cir. filed July 3, 2014); U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582, at 19 (2d Cir. filed Nov. 4, 2011). The Ninth Circuit "acknowledge[d] that the United States * * * disagrees with [its] interpretation." *Bennett*, 825 F.3d at 961 n.7.

Iran thus agrees with petitioners that "[t]he issue is ripe for Supreme Court review." Pet. 22. The same issue is also pending in *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016), in which Bank Melli—an in-

strumentality of the Islamic Republic of Iran—seeks review of the Ninth Circuit's decision on the other side of the circuit conflict.

2. Unlike this case, however, *Bank Melli* also presents a second important question on which the circuits are also divided. As the petition in *Bank Melli* explains, TRIA permits execution against blocked "assets of" the sovereign, 28 U.S.C. §1610 note §201(a), and §1610(g) permits execution against "property of" the sovereign, 28 U.S.C. §1610(g)(1). The circuits are divided over the proper construction of that language. The Ninth Circuit held in *Bank Melli* that state rather than federal law determines whether a sovereign's interest in property is sufficient to permit execution, and that state law may permit execution even if the sovereign does not *own* the property. See *Bennett*, 825 F.3d at 963-964. The Second Circuit agrees that state law applies. See *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014), cert. denied, 136 S. Ct. 893 (2016). By contrast, in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), the D.C. Circuit held that federal law governs that issue and that federal law requires ownership. *Id.* at 938-941. The Executive Branch agrees that the statutes require ownership. See Pet. in No. 16-334, at 29.

Granting review in *Bank Melli* would thus enable the Court to resolve not only the circuit conflict over §1610(g), but also that separate conflict over the ownership requirement. Alternatively, if the Court is inclined to grant review in this case, it should also grant review in *Bank Melli* as well and consolidate the two cases for argument. Granting review in both cases would enable the Court to consider the issue in multiple factual settings and would ensure consistent dispositions.

Finally, the Court may also wish to invite the Solicitor General to express the views of the United States in both cases. The Court has taken that approach in several similar cases. See, *e.g.*, *Bank Markazi* v. *Peterson*, 135 S. Ct. 1753 (2015); *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011). The Court should consider the same approach here.

B. The Seventh Circuit's Decision Is Correct

On the merits, the decision below is correct.

1. Section 1610(g) permits creditors to execute terrorism judgments against the assets of a foreign sovereign *or* the assets of its agencies or instrumentalities "*as provided in this section*, regardless of" the five *Bancec* factors. 28 U.S.C. §1610(g)(1) (emphasis added). By its plain terms, that language merely eliminates the five *Bancec* factors as a barrier to recovery. It is not naturally read as a freestanding exception to immunity. If Congress had intended to create a freestanding immunity exception, it would have said that such assets are subject to execution, period—not that they are subject to execution "as provided in this section, regardless of" *Bancec*.

The Ninth Circuit provided no plausible account for Congress's inclusion of the phrase "as provided in this section." The court held that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in §1610(f)." *Bennett*, 825 F.3d at 959. But, as the Seventh Circuit explained below, that is an "implausibl[e]," "highly strained" interpretation that "makes no sense." Pet. App. 33a-34a. Section 1610(g) refers to "this *section*," not any particular *sub*section. 28 U.S.C. §1610(g)(1) (emphasis added). And because the President waived §1610(f)'s execution mechanism the day it

was enacted, it makes no sense to read "as provided in this section" to refer to §1610(f). If that were the case, "execution 'as provided in this section' would mean no execution at all." Pet. App. 34a.

As the court below explained, moreover, the Ninth Circuit's interpretation also "creates superfluities in other parts of the statute." Pet. App. 27a. Subsections 1610(a)(7) and (b)(3) already provide for execution of terrorism judgments entered under §1605A where certain commercial activity requirements are met. 28 U.S.C. §1610(a)(7), (b)(3). Those exceptions would be superfluous if §1610(g) were a freestanding immunity exception that allowed execution of all terrorism judgments without regard to any commercial activity.

2. None of petitioners' responses has any merit. For example, petitioners deny that their interpretation of §1610(g) renders §1610(a)(7) and (b)(3) superfluous. Section 1610(g), they urge, permits execution only of judgments entered under the *current* terrorism exception codified at §1605A, while §1610(a)(7) and (b)(3) also permit execution of judgments entered under the *pre-2008* exception formerly codified at §1605(a)(7). Pet. 27. As a result, petitioners contend, §1610(a)(7) and (b)(3) retain independent force. *Ibid.*

That argument misses the point. At the same time Congress enacted §1605A and §1610(g) in 2008, it amended §1610(a)(7) and (b)(3) to provide that those exceptions apply to judgments entered under the new terrorism exception in §1605A. See Pub. L. No. 110-181, §1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008). That *amendment* would have been entirely unnecessary under petitioners' construction of §1610(g): There would be no reason to make §1605A judgments enforceable under §1610(a)(7) and (b)(3) in cases where certain commercial

activity requirements were met, if such judgments were enforceable in *every* case under § 1610(g) regardless.[3]

Alternatively, petitioners urge that § 1610(g) must be a freestanding immunity exception because it applies to both "property of a foreign state" *and* "property of an agency or instrumentality * * * , including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. § 1610(g)(1). According to petitioners, some of that language would be unnecessary if the statute merely abrogated *Bancec*'s presumption of separate status. Pet. 26-27. Had that been Congress's intent, they assert, the statute could have referred simply to separate juridical entities. *Ibid.*

That argument does not support petitioners' construction. Congress's evident intent in enacting § 1610(g) was to ensure that property otherwise subject to execution would be available to satisfy a terrorism judgment, whether owned by the state itself or by an agency or instrumentality, including a juridically separate one. In other words, property owned by a juridically separate agency or instrumentality should be treated the same way as property owned by any other agency or instru-

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[3] Indeed, when Congress enacted § 1610(g) in 2008, it *deleted* the references to § 1605(a)(7) from § 1610(a)(7) and (b)(3), replacing them with references to § 1605A. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008). It was not until 2012 that Congress restored the references to § 1605(a)(7) in those provisions so plaintiffs could execute either old judgments obtained under § 1605(a)(7) or new judgments obtained under § 1605A. See Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012). Petitioners' reasoning is thus incorrect even on its own terms: Under their construction of § 1610(g), § 1610(a)(7) and (b)(3) would have been wholly superfluous for the entire period from 2008 to 2012. The subsequent 2012 amendment sheds no light on Congress's intent in 2008.

mentality, which should be treated the same way as property owned by the state itself. Section 1610(g)'s phrasing is a reasonable way to express that concept. That Congress could have accomplished the same result in different ways or with fewer words does not make its chosen approach superfluous.

In any event, petitioners' argument does not remedy the basic flaw in their position. Whatever Congress's reason for referring in § 1610(g) to "property of a foreign state" or "property of an agency or instrumentality" that is not juridically separate, the fact remains that § 1610(g) permits execution against such property only "*as provided in this section.*" 28 U.S.C. § 1610(g)(1) (emphasis added). Petitioners still have not offered any plausible explanation for that critical language.

The dramatic consequences of petitioners' interpretation are reason enough to reject it. On petitioners' theory, § 1610(g) imposes no limitations at all on the types of property subject to execution—indeed, their interpretation would seemingly cover not only ancient cultural artifacts of the sort at issue here, but even diplomatic property whose attachment would violate the Nation's treaty obligations. See Vienna Convention on Diplomatic Relations, art. 22.3, Apr. 18, 1961, 23 U.S.T. 3227, 3238. Notably, when Congress has created freestanding immunity exceptions for terrorism judgments in other statutes, it has been careful to exempt diplomatic property. See 28 U.S.C. § 1610 note § 201(d)(2)(B)(ii) (TRIA exemption for diplomatic property). The absence of any similar exception in § 1610(g) confirms that the provision was not intended to establish a new blanket immunity exception for terrorism judgments, but instead to accomplish the more modest goal of abrogating *Bancec*'s presumption of separate status in terrorism cases.

II. The Second Question Presented Does Not Warrant Review

The Court should deny review of the second question presented. There is no circuit conflict, the Seventh Circuit's decision is correct, and the petition identifies no other basis for review.

A. There Is No Circuit Conflict over the Proper Interpretation of § 1610(a)

Petitioners' second question presented concerns the proper construction of § 1610(a). The Seventh Circuit held that § 1610(a) deprives sovereign property of immunity only where the property is used for a commercial activity in the United States *by the foreign sovereign*. Pet. App. 20a. Petitioners contend that commercial use *by anyone* will suffice. Pet. 32-35. There is no circuit conflict over that question. The petition does not contend otherwise. Rather, as the Seventh Circuit noted, every circuit to have addressed the issue has agreed with its interpretation: Section 1610(a) "applies only when *the foreign state itself* has used its property for a commercial activity in the United States; the actions of third parties are irrelevant." Pet. App. 20a.

In *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240 (5th Cir. 2002), for example, the Fifth Circuit held that "what matters under [§ 1610(a)] is how the *foreign state* uses the property, not how private parties may have used the property." *Id.* at 256 n.5. The court quoted authority holding that "the foreign state's use of the property for commercial activity is necessary for § 1610(a) to apply." *Ibid.* And it refused to allow "a private party's commercial use of the property to count for § 1610(a)." *Ibid.*

The Ninth Circuit agreed with that approach in *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007). The court quoted the Fifth Circuit's reasoning from *Connecticut Bank of Commerce*. *Id.* at 1090-1091. And it emphasized that "allow[ing] a private party's commercial use of the property to waive a foreign sovereign's immunity would not only frustrate 'one of the principal goals of the FSIA' * * * but would also effectively eviscerate the protections of the FSIA by essentially placing the power to waive the foreign sovereign's immunity in the hands of private parties." *Id.* at 1091.

Finally, the Second Circuit joined that consensus in *Aurelius Capital Partners, L.P.* v. *Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009). The court held that "the funds *in the hands of the Republic* must have been 'used for a commercial activity.'" *Id.* at 131. "The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry." *Ibid.*

The United States agrees with that interpretation. "Section 1610(a)," it explained below, "should be read as reaching only property that is used by the foreign state itself for commercial activity; third-party acts are irrelevant." C.A. Dkt. 54, at 17 (filed Nov. 3, 2014).

Petitioners assert that "none of the courts claimed to be part of this 'consensus' dealt with the issue." Pet. 36. That argument ignores the clear text of the decisions, which plainly requires that *the foreign sovereign itself* use the property for a commercial activity. Even if petitioners' argument had merit, moreover, it would not be grounds for review. Whether the circuit tally on this issue is 4-0 or merely 1-0, the fact remains that no circuit has ever adopted petitioners' interpretation. There is no plausible basis for review.

B. The Seventh Circuit's Decision Is Correct

The Seventh Circuit's interpretation of § 1610(a) is also correct. Section 1610(a) by its terms applies only to "[t]he property in the United States *of a foreign state* * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a) (emphasis added). Read in isolation, that provision is potentially ambiguous as to whether it refers to usage by the foreign state that owns the property or usage by any party at all. But the Act's broader text, structure, and history eliminate any doubt.

First, the Seventh Circuit properly looked to the FSIA's statutory declaration of purpose. Pet. App. 17a. That provision makes clear that the exceptions to immunity depend on commercial activity *of the sovereign itself*. It states: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." 28 U.S.C. § 1602 (emphasis added). Petitioners' construction of § 1610(a) puts the provision at war with the statute's explicitly stated purpose.

The Seventh Circuit's interpretation also respects the Act's history. The FSIA sought to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7 (1976). Under that theory, immunity depends on acts *of the sovereign*, not third parties. See *ibid.* ("[I]mmunity of a foreign state is 'restricted' to suits involving a *foreign state's* public acts * * * and does not extend to suits based on *its* commercial or private acts * * * ." (emphasis added)); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (restrictive theory denies immunity for "cases arising out of a *foreign state's* strictly

commercial acts" (emphasis added)). That remains true today. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 19(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (immunity inapplicable to property "specifically in use or intended for use *by the State* for other than government non-commercial purposes" (emphasis added)). Construing § 1610(a) to turn on the commercial activities of *third parties* would be a dramatic departure from the traditional restrictive theory.[4]

The FSIA's structure confirms the Seventh Circuit's interpretation. As the Seventh Circuit observed, the Act's *jurisdictional* exception for commercial activity applies to "commercial activity carried on in the United States *by the foreign state*." 28 U.S.C. § 1605(a)(2) (emphasis added). The exception thus expressly requires activity by the sovereign itself. Construing § 1610(a) to omit that requirement would render the Act's execution exception broader than its jurisdictional counterpart. That result would defy the general scheme of the FSIA, in which the execution exceptions are "narrower" than the jurisdictional exceptions. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

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[4] For that reason, petitioners' reliance on *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), cert. denied, 564 U.S. 1037 (2011), is misplaced. Pet. 34. *Cassirer* held that the FSIA's expropriation exception applies whether or not the respondent is the state that expropriated the property. *Id.* at 1031-1032. But the court was careful to note that, even as so construed, the exception applies only to property used "'in connection with a commercial activity carried on in the United States *by the foreign state*.'" *Id.* at 1027, 1031 (quoting 28 U.S.C. § 1605(a)(3)) (emphasis added). The court's interpretation was therefore fully consistent with the restrictive theory and its requirement of commercial activity *by the sovereign itself*.

Moreover, §1610(b) provides for execution against property of sovereign *agencies or instrumentalities* where the "agency or instrumentality * * * [is] engaged in commercial activity in the United States." 28 U.S.C. §1610(b). That provision too focuses on activity *of the sovereign entity*, not third parties. Construing §1610(a) to extend to commercial uses by third parties would render the provisions for execution against property of the foreign state itself more expansive in that respect than the provision for execution against property of agencies and instrumentalities. That too would be contrary to the Act's general scheme, in which the immunity exceptions for the sovereign itself are narrower than the exceptions for agencies and instrumentalities. See *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) ("Congress sharply restricted immunity from execution against agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the State itself.").

Finally, petitioners' construction would produce absurd results. On their theory, sovereign property would lose its immunity if an authorized possessor of the property put it to an unauthorized commercial use. Indeed, sovereign property would lose its immunity even if it were stolen and put to commercial use by thieves. It is inconceivable that Congress intended those results.

C. This Case Is a Poor Vehicle for Addressing the Issue

Finally, this case is an unsuitable vehicle for resolving the proper interpretation of §1610(a) because petitioners would not prevail even under their own interpretation. As Iran and the museums have urged from the outset of this case, the antiquities at issue are not being used for commercial activity by *any* party, because the museums'

academic study of the artifacts does not qualify as a commercial use. Pet. App. 16a, 51a, 57a n.10. Accordingly, whether a third party's commercial use is sufficient under the statute is beside the point: It would not change the outcome in this case.

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The museums' academic study of irreplaceable artifacts of Iran's cultural heritage does not fall within that definition. See, *e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 21(d), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (citing "property forming part of the cultural heritage of the State * * * and not placed or intended to be placed on sale" as an example of non-commercial property immune from attachment).

The court of appeals, while not ultimately resolving the issue, was "skeptical that academic study qualifies as a commercial use." Pet. App. 16a. The court was right to be skeptical: The museums' academic study of cultural artifacts is not "commercial activity" in any sense. As a result, petitioners' dispute over the proper interpretation of § 1610(a) is (likewise) wholly academic.

CONCLUSION

With respect to the first question presented, if the Court is inclined to grant the petition, it should also grant the petition in *Bank Melli* v. *Bennett*, No. 16-334, and consolidate the cases for argument. With respect to the second question presented, the petition should be denied.

Respectfully submitted.

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NOVEMBER 2016

RECORD AND BRIEFS

No. 16-534

IN THE
Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

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QUESTION PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Section 1610(g) of the Foreign Sovereign Immunities Act provides that, for certain terrorism judgments, property of a foreign state and property of an agency or instrumentality of such a state are subject to execution "as provided in this section, regardless of" five factors associated with *Bancec*. 28 U.S.C. §1610(g)(1). The question presented is:

Whether §1610(g) establishes a freestanding exception to sovereign immunity or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in §1610.

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement	2
I. Statutory Framework	2
A. The Foreign Sovereign Immunities Act of 1976	2
1. The FSIA's Immunity Provisions	3
2. Substantive Liability of Juridically Distinct Entities Under *Bancec*	5
B. The Terrorism Amendments to the FSIA	6
1. The 1996 Terrorism Exceptions	6
2. The Amendments Relating to Blocked Assets	7
3. The 2008 Amendments at Issue Here	9
4. The 2012 Amendments	12
II. Proceedings Below	12
A. Proceedings in the District Court	13
B. The Court of Appeals' Decision	14
Summary of Argument	17
Argument	21
I. The Text, Structure, and History of § 1610(g) Show That It Is an Exception to *Bancec*, Not a Freestanding Immunity Exception	22
A. Section 1610(g)'s Text Is Clear	22

TABLE OF CONTENTS—Continued

Page

B. Congress's Contemporaneous Amendments to the FSIA Confirm That § 1610(g) Is Not a Free-standing Immunity Exception 27

C. Section 1610(g)'s History Confirms That Congress Merely Sought To Abrogate the *Bancec* Presumption for Terrorism Judgments 29

II. Petitioners' Contrary Arguments Lack Merit 33

A. Petitioners Offer No Plausible Construction of the Phrase "As Provided in This Section" 33

1. "As Provided in This Section" Does Not Refer to § 1610(f) 33

2. "As Provided in This Section" Does Not Refer to NDAA § 1083 35

3. "As Provided in This Section" Does Not Refer Solely to Procedural Provisions in § 1610 37

B. Petitioners Cannot Avoid the Surplusage Their Construction Creates 38

C. Construing § 1610(g) Consistent with Its Express Terms Does Not Render It Self-Defeating 41

1. The Seventh Circuit's Construction Does Not Conflict with § 1610(g)'s *Bancec* Factors 41

TABLE OF CONTENTS—Continued

Page

2. Section 1610(g) Is Not Self-Defeating Merely Because It May Not Enhance Plaintiffs' Position Under Every Provision of § 1610 42

3. The Seventh Circuit's Construction Does Not Create Superfluity Within § 1610(g) 44

III. Petitioners' Construction Disregards Tradition and International Practice 46

A. Petitioners' Construction Is a Dramatic Departure from the Traditional Restrictive Theory 47

B. Petitioners' Construction Would Put the United States at Odds with International Law 49

C. Congress's Policy Against Terrorism Cannot Justify Disregarding § 1610(g)'s Limitations 52

D. Petitioners' Interpretation Threatens Important Foreign Policy Interests 55

Conclusion 57

Statutory Appendix 1a

TABLE OF AUTHORITIES

Page(s)

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Abbott v. *Republic of South Africa*, No. 107/92, S.T.C., July 1, 1992 (Spain), translated in 113 I.L.R. 411 (1999) 51

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TABLE OF AUTHORITIES—Continued

Page(s)

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TABLE OF AUTHORITIES—Continued

Page(s)

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STATUTES

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 ..... *passim*

28 U.S.C. § 1602 ..... 3, 47

28 U.S.C. § 1603(a) 3

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28 U.S.C. § 1605(a)(4) 48

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TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1605(a)(7) ..... *passim*
28 U.S.C. § 1605(h) 54
28 U.S.C. § 1605A ..... *passim*
28 U.S.C. § 1605A(a) 9
28 U.S.C. § 1605A(a)(2)(A)(i)(II) 36
28 U.S.C. § 1605A(a)(2)(A)(ii) 41
28 U.S.C. § 1605A(c) 9, 27, 37
28 U.S.C. § 1605A(d) 37
28 U.S.C. § 1605A(g) 9, 27, 37
28 U.S.C. § 1605A(g)(1)(A) 37
28 U.S.C. § 1605B 48
28 U.S.C. § 1609 ..... *passim*
28 U.S.C. § 1610 ..... *passim*
28 U.S.C. § 1610(a) ..... *passim*
28 U.S.C. § 1610(a)(1)-(7) 38
28 U.S.C. § 1610(a)(1) 4, 43
28 U.S.C. § 1610(a)(2) 4
28 U.S.C. § 1610(a)(3) 43
28 U.S.C. § 1610(a)(7) ..... *passim*
28 U.S.C. § 1610(b) ..... *passim*
28 U.S.C. § 1610(b)(1)-(3) 38
28 U.S.C. § 1610(b)(1) 43
28 U.S.C. § 1610(b)(2) ..... *passim*
28 U.S.C. § 1610(b)(3) ..... *passim*
28 U.S.C. § 1610(c) 24, 38, 43
28 U.S.C. § 1610(d) 25, 38, 43
28 U.S.C. § 1610(e) 25, 38
28 U.S.C. § 1610(f) ..... *passim*
28 U.S.C. § 1610(f)(1) ..... *passim*
28 U.S.C. § 1610(f)(1)(A) 8, 26
28 U.S.C. § 1610(f)(2) 34, 35, 38, 43
28 U.S.C. § 1610(f)(3) 8

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610(g) ..... *passim*
28 U.S.C. § 1610(g)(1) ..... *passim*
28 U.S.C. § 1610(g)(1)(A)-(E) 23
28 U.S.C. § 1610(g)(3) 34
28 U.S.C. § 1611 34
§ 4, 90 Stat. at 2891 48

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 6, 7, 48
§ 221(a), 110 Stat. at 1241 6
§ 221(b), 110 Stat. at 1242 48
§ 221(b)(1), 110 Stat. at 1242 6
§ 221(b)(2), 110 Stat. at 1243 7

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§ 117(a), 112 Stat. at 2681-491 8
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TABLE OF AUTHORITIES—Continued

Page(s)

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§ 1083(b)(3), 122 Stat. at 341 ..... 9, 35
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§ 1083(b)(3)(C), 122 Stat. at 341..... 10, 18, 28
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§ 1083(c)(2)(A), 122 Stat. at 342..... 35
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§ 502(e), 126 Stat. at 1260 12
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§ 502(e)(1)(B), 126 Stat. at 1260..... 7
§ 502(e)(2), 126 Stat. at 1260 12

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Page(s)

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TABLE OF AUTHORITIES—Continued

Page(s)

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IN THE

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NO. 16-534

JENNY RUBIN, *et al.*,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

PRELIMINARY STATEMENT

Petitioners brought this enforcement action to seize ancient Persian artifacts that Iran loaned to the University of Chicago for academic study almost a century ago. That seizure would require a dramatic departure from traditional immunity principles. Nothing in 28 U.S.C. § 1610(g) countenances that extreme result.

Congress enacted § 1610(g) to accomplish a more modest goal: abrogating for terrorism cases the presumption of separate status that sovereign instrumentalities ordinarily enjoy under this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Section 1610(g)

provides that assets are subject to execution on certain terrorism judgments "as provided in this section, regardless of" certain factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1). Plaintiffs thus may execute against assets "regardless of" *Bancec*'s presumption of separate status. But the assets are subject to execution only "as provided in this section," *i.e.*, under *existing* immunity rules. The statute does not say that plaintiffs may execute "regardless of" sovereign immunity principles generally.

Petitioners' contrary construction would render parts of the statute completely superfluous. It finds no support in the legislative history. And it flouts this Court's repeated admonitions that statutes should be construed in a manner consistent with international law.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act of 1976

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity for a state's "strictly commercial acts." *Id.* at 486-487. As the State Department explained, the "practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep't of State Bull. 984, 985 (May 19, 1952).

Two decades later, Congress codified that restrictive theory in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as

amended at 28 U.S.C. §§ 1602 *et seq.*). The Act explains that, "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. The FSIA sought to "codify th[at] so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7 (1976).

1. *The FSIA's Immunity Provisions*

The FSIA governs the immunity of "foreign state[s]," a term that includes the sovereign itself as well as any "agency or instrumentality" thereof. 28 U.S.C. § 1603(a). An agency or instrumentality is an entity established as "a separate legal person, corporate or otherwise," that is an organ or political subdivision of the state or a majority state-owned enterprise. *Id.* § 1603(b)(1)-(2). Typical examples include a "state trading corporation," a "mining enterprise," or a "central bank." H.R. Rep. No. 94-1487, at 15-16.

The FSIA addresses both (1) the immunity of *foreign sovereigns from suit*; and (2) the immunity of *sovereign property from attachment and execution*. With respect to immunity from suit—commonly known as "jurisdictional" immunity—the FSIA preserves the general rule that "a foreign state [including an agency or instrumentality] shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The Act then lists carefully circumscribed exceptions. *Id.* § 1605. For example, under the "commercial activity" exception, a foreign sovereign is not immune from actions "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Before the FSIA's enactment, sovereign property "enjoy[ed] absolute immunity from execution," even under the restrictive theory. H.R. Rep. No. 94-1487, at 8. Plaintiffs who obtained judgments against foreign states thus had to rely on sovereign grace for their satisfaction. Section 1609 of the FSIA retains the general rule that "property in the United States of a foreign state [including an agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. § 1609.

The FSIA, however, provides limited exceptions to that immunity in § 1610. Section 1610(a) lists exceptions that apply both to property of the sovereign itself and to property of its agencies and instrumentalities. Under that provision, "property in the United States of a foreign state [including property of an agency or instrumentality] used for a commercial activity in the United States" is not immune from execution if one of certain additional conditions is met. 28 U.S.C. § 1610(a). Under § 1610(a)(1), for example, property of a foreign state used for commercial activity in the United States is not immune from execution if the foreign state has waived its immunity. *Id.* § 1610(a)(1). Under § 1610(a)(2), property of a foreign state used for commercial activity in the United States is not immune if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2).

Section 1610(b) provides additional exceptions for property of a foreign state's agencies or instrumentalities. Such property is not immune from execution if the agency or instrumentality is "engaged in commercial activity in the United States" and one of certain further conditions is met. 28 U.S.C. § 1610(b). Thus, consistent

with the restrictive theory, both § 1610(a) and § 1610(b) require commercial activity.

2. *Substantive Liability of Juridically Distinct Entities Under* Bancec

As a general matter, the FSIA does not address the circumstances in which a sovereign's agencies or instrumentalities may be held liable for judgments against the sovereign itself. This Court resolved that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *Bancec* explained that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620. Instead, such matters are governed by substantive international and federal common law. *Id.* at 623. Applying that law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

Bancec identified two narrow exceptions to that presumption of separate status. First, a court may pierce an instrumentality's corporate veil where the entity is "so extensively controlled by its owner that a relationship of principal and agent is created." 462 U.S. at 629. Second, a court may disregard an instrumentality's separate status where the sovereign has abused the corporate form to "'work fraud or injustice.'" *Ibid.*

In the wake of *Bancec*, courts developed five "factors" to determine whether the presumption of separate status had been overcome. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Consistent with

Bancec's first exception—and its focus on whether the sovereign exercised pervasive dominion and control over the instrumentality—those factors included such considerations as "the level of economic control by the government" and "the degree to which government officials manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7.

B. The Terrorism Amendments to the FSIA

Over the last two decades, Congress has repeatedly amended the FSIA to address terrorism claims.

1. *The 1996 Terrorism Exceptions*

Congress first amended the FSIA to permit terrorism claims against foreign sovereigns in 1996. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241. That statute added a new exception to jurisdictional immunity that was originally codified at 28 U.S.C. § 1605(a)(7). The exception denied immunity for claims arising from certain acts of terrorism or material support for terrorism if the United States had designated the foreign sovereign a state sponsor of terrorism. *Ibid.*

The 1996 amendments also added exceptions to execution immunity for judgments obtained under § 1605(a)(7). First, Congress expanded the circumstances in which a foreign state's "property in the United States * * * used for a commercial activity in the United States" would lose immunity. 28 U.S.C. § 1610(a). Specifically, § 1610(a)(7) denied immunity to such commercial property when "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based." Pub. L. No. 104-132, § 221(b)(1),

110 Stat. at 1243 (codified as amended at 28 U.S.C. §1610(a)(7)).

Congress similarly expanded the circumstances in which the U.S. property of "an agency or instrumentality of a foreign state engaged in commercial activity in the United States" would lose immunity. 28 U.S.C. §1610(b). Congress amended §1610(b)(2) to deny immunity to such property when the judgment related to a claim under §1605(a)(7), whether or not the property was involved in the act on which the claim was based. See Pub. L. No. 104-132, §221(b)(2), 110 Stat. at 1243 (amending 28 U.S.C. §1610(b)(2)). (Years later, Congress moved that exception to its own provision in §1610(b)(3). See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, §502(e)(1)(B), 126 Stat. 1214, 1260.)

Congress thus expanded the range of property that was not immune from execution for plaintiffs with terrorism judgments under §1605(a)(7). But the new provisions still required commercial activity: They applied only to property used by the sovereign for commercial activity in the United States, or property of an agency or instrumentality engaged in commercial activity in the United States.

2. *The Amendments Relating to Blocked Assets*

In 1998, Congress added another exception for execution of terrorism judgments—this time for assets the Executive Branch had "blocked" or otherwise regulated under economic sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, §117, 112 Stat. 2681, 2681-491 (1998). Codified as §1610(f)(1), that exception provided:

> Notwithstanding any other provision of law, * * * any property with respect to which financial trans-

> actions are prohibited or regulated pursuant to [various sanctions statutes] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune under section 1605(a)(7).

Id. § 117(a), 112 Stat. at 2681-491 (codified as amended at 28 U.S.C. § 1610(f)(1)(A)).

Congress authorized the President to waive subsection (f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately did so, finding that it "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

Two years later, Congress repealed the provision authorizing that waiver. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543. In light of Executive Branch opposition, however, Congress added a new waiver provision before the bill's enactment. See *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)). The President promptly issued another waiver. 65 Fed. Reg. 66,483 (Oct. 28, 2000).

In 2002, Congress revisited the topic of blocked assets in the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337. Section 201(a) of that statute provided:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) * * *, the

> blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Id. § 201(a), 116 Stat. at 2337 (reproduced as amended at 28 U.S.C. § 1610 note § 201(a)).

3. *The 2008 Amendments at Issue Here*

In 2008, Congress enacted the statute at issue here: Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338 (reproduced App., *infra*, 1a-12a). That statute made several relevant changes.

First, in NDAA § 1083(a), Congress created a new exception to jurisdictional immunity for terrorism claims. Pub. L. No. 110-181, § 1083(a), 122 Stat. at 338. Codified at 28 U.S.C. § 1605A, that provision replaced the original exception at § 1605(a)(7). *Id.* § 1083(a), (b)(1), 122 Stat. at 338-341. Like former § 1605(a)(7), the new provision abrogates jurisdictional immunity for terrorism claims against designated state sponsors of terrorism. 28 U.S.C. § 1605A(a). But it also expands the available remedies by, among other things, creating an express federal cause of action, authorizing punitive damages, and providing for liens of *lis pendens*. *Id.* § 1605A(c), (g).

Second, in NDAA § 1083(b)(3), Congress revised various exceptions to execution immunity to make them available for § 1605A judgments. Congress updated the commercial activity exception for terrorism judgments in § 1610(a)(7), making it applicable to judgments under new § 1605A rather than old § 1605(a)(7). See Pub. L. No. 110-

181, § 1083(b)(3)(A), 122 Stat. at 341. Congress made essentially the same change to the commercial activity exception for instrumentality assets in § 1610(b)(2) (now § 1610(b)(3)). See *id.* § 1083(b)(3)(B), 122 Stat. at 341. And it made a similar change to the exception for blocked or regulated assets in § 1610(f). See *id.* § 1083(b)(3)(C), 122 Stat. at 341.

Finally, in NDAA § 1083(b)(3)(D), Congress enacted the provision at issue in this case—28 U.S.C. § 1610(g). See Pub. L. No. 110-181, § 1083(b)(3)(D), 122 Stat. at 341. That provision states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, *including* property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section, regardless of*—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1) (emphasis added). The five factors in paragraphs (A) through (E) are the same five "*Bancec* factors" that courts had used to determine whether a plaintiff had overcome *Bancec*'s presumption of separate juridical status. See, *e.g.*, *Flatow*, 308 F.3d at 1071 n.9.

Section 1610(g) originated from a bill proposed in 2005. See S. 1257, 109th Cong. § 2 (2005); H.R. 865, 109th Cong. § 2 (2005). Introducing that legislation, Senator Specter explained that § 1610(g) was designed to "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism * * * by changing the legal standard of the Bancec doctrine from day to day managerial control to those under the beneficial ownership of the state." 151 Cong. Rec. 12,869 (June 16, 2005).

Senator Lautenberg gave a similar explanation in 2008. "The misapplication of the 'Bancec doctrine,'" he stated, "has in the past erroneously protected the assets of terrorist states from attachment or collection." 154 Cong. Rec. 500 (Jan. 22, 2008). One court, for example, had held that plaintiffs "could not attach [an] asset because they could not show that [the sovereign] exercised day-to-day managerial control" over the instrumentality. *Ibid.* Section 1610(g) would "remedy this issue by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." *Ibid.*; see also H.R. Rep. No. 110-477, at 1001 (2007) (explaining that § 1610(g) would "subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution").

Neither Senator Specter, nor Senator Lautenberg, nor anyone else expressed dissatisfaction with the commercial activity requirements for overcoming execution immunity. Nor did anyone identify a purpose for § 1610(g)

beyond abrogating *Bancec*'s presumption of separate status and replacing *Bancec*'s focus on day-to-day managerial control with a "simple" or "beneficial" ownership standard.

4. *The 2012 Amendments*

Four years later, Congress again adjusted the provisions governing execution immunity for terrorism judgments. See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, §502(e), 126 Stat. 1214, 1260.

First, Congress amended the commercial activity exceptions in §1610(a)(7) and §1610(b)(2) (now §1610(b)(3)). Having updated those provisions in 2008 to refer to §1605A rather than §1605(a)(7), Congress again amended them to refer to *both* §1605A *and* §1605(a)(7). See Pub. L. No. 112-158, §502(e)(1), 126 Stat. at 1260. As a result, plaintiffs can now invoke those commercial activity exceptions whether they have new terrorism judgments under §1605A or old ones under §1605(a)(7).

Congress also amended TRIA. That statute had previously made blocked assets available only to plaintiffs holding judgments under old §1605(a)(7). Pub. L. No. 107-297, §201(a), 116 Stat. at 2337. Congress amended the statute so plaintiffs holding §1605A judgments could invoke it too. See Pub. L. No. 112-158, §502(e)(2), 126 Stat. at 1260.

II. PROCEEDINGS BELOW

Petitioners are American citizens injured in a 1997 terrorist attack in Jerusalem. Pet. App. 5a. They filed suit against the Islamic Republic of Iran, alleging that it had provided support to Hamas, the organization that carried out the attack. *Ibid.* Iran declined to appear and, in 2003, petitioners obtained a default judgment. *Id.* at 6a.

A. Proceedings in the District Court

1. Petitioners commenced this action in an effort to satisfy their default judgment by executing against four collections of ancient Persian artifacts held by the University of Chicago's Oriental Institute and the Field Museum of Natural History. Pet. App. 6a.

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments "containing some of the oldest writings in the world." Pet. App. 4a-5a. The Oriental Institute uncovered those artifacts when it excavated the ancient city of Persepolis with Iran's permission in the 1930s. C.A. R. 657 at 4. The tablets and fragments date from around 500 B.C., and many are inscribed with cuneiform Elamite, a rare and lost language that is difficult to translate. *Ibid.*; C.A. R. 648 Ex. 4; see Oriental Institute, *Photographic Archives: Persepolis and Ancient Iran*, https://oi.uchicago.edu/persepolis-ancient-iran. In 1937, Iran loaned the Persepolis Collection to the Oriental Institute for research, translation, and cataloguing. Pet. App. 4a-5a.

The Chogha Mish Collection consists of clay seal impressions that Iran excavated from the ancient Chogha Mish settlement in the 1960s and then loaned to the Oriental Institute for academic study. Pet. App. 5a. The Herzfeld Collection includes approximately 1200 prehistoric artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archaeologist. *Ibid.* Finally, the Oriental Institute Collection contains Persian artifacts donated by Iran and various other donors. *Id.* at 5a, 47a n.6.[1]

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[1] The Chogha Mish artifacts were returned to Iran following the district court's decision, and Iran has disclaimed any ownership of the

2. The district court granted summary judgment to Iran and the museums, holding that the antiquities were immune from execution. Pet. App. 43a-71a. The court first held that §1610(a)'s commercial activity exception did not apply. *Id.* at 50a-57a. Petitioners argued that the *museums* had engaged in commercial activity by "studying and displaying the artifacts." *Id.* at 51a. But even assuming that conduct could be deemed "commercial," the court held, §1610(a) "requires the commercial activity to be conducted by the sovereign." *Id.* at 57a.

The district court also rejected petitioners' argument that, even absent commercial activity, §1610(g) abrogated the antiquities' immunity from execution. Pet. App. 57a-62a. "Section 1610(g)," the court held, "is not a separate basis of attachment." *Id.* at 61a. Rather, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* at 62a. Because §1610(g) was not an independent exception to immunity, the provision "d[id] not subject the collections in question to attachment and execution." *Ibid.*[2]

B. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-38a.

1. The court of appeals agreed with the district court that petitioners could not execute against the antiquities under §1610(a)'s commercial activity exception. Pet.

Herzfeld and Oriental Institute Collections. Pet. App. 8a-10a. Consequently, only the Persepolis Collection remains at issue. *Id.* at 10a.

[2] The district court also ruled that petitioners could not execute against the antiquities under TRIA, because they were not "blocked assets." Pet. App. 62a-70a. The court of appeals agreed, *id.* at 35a-38a, and petitioners did not seek review of that ruling.

App. 14a-21a. The court was "skeptical" that the museums' "academic study qualifies as a commercial use." *Id.* at 16a. But even if it did, "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity," and "[n]othing in the record suggests that Iran itself used the Persepolis Collection for a commercial activity." *Id.* at 20a. Although petitioners sought this Court's review of that ruling, the Court excluded the issue in its order granting certiorari. 137 S. Ct. 2326 (2017).

2. The court of appeals likewise agreed with the district court that petitioners could not use §1610(g) to avoid the commercial activity requirement. Pet. App. 21a-35a. The court rejected petitioners' contention that §1610(g) is "a freestanding exception to execution immunity for terrorism-related judgments." *Id.* at 22a-28a. "Section 1610(g)," the court held, "is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the *Bancec* rule for terrorism-related judgments." *Id.* at 35a.

The court of appeals began by noting that §1610(g) undeniably abrogated *Bancec*'s rule that "foreign sovereigns and their instrumentalities are treated separately for execution purposes." Pet. App. 21a-22a. Courts had identified five factors to consider when deciding whether *Bancec*'s presumption of separate status had been overcome. *Id.* at 23a-24a. Section 1610(g) made those five factors "irrelevant" by declaring that plaintiffs with §1605A judgments could "execute on the property of the foreign state *and* the property of its agency or instrumentality '*as provided in this section*' but '*regardless of*' the five factors listed in subsections (A)-(E)." *Id.* at 25a (quoting 28 U.S.C. §1610(g)(1)). "[T]he five factors made irrelevant by subsection (g) mirror almost exactly the

factors developed by the lower courts under the *Bancec* doctrine." *Ibid.*

The court of appeals rejected petitioners' argument that "subsection (g) goes further and establishes a free-standing 'terrorism' exception to execution immunity." Pet. App. 26a. Section 1610(g), the court observed, states that property of a sovereign and its instrumentalities is subject to execution only "'*as provided in this section.*'" *Id.* at 27a. "The highlighted phrase makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity." *Ibid.* Petitioners' interpretation thus "violate[d] the 'cardinal principle' that a statute should be interpreted to avoid superfluity." *Ibid.*

Petitioners' interpretation also "create[d] superfluities in other parts of the statute." Pet. App. 27a. Sections 1610(a)(7) and (b)(3) already deny immunity from execution of terrorism judgments where certain commercial conduct is shown. *Ibid.* (citing 28 U.S.C. §1610(a)(7), (b)(3)). If §1610(g) "pave[d] a dedicated lane for all execution actions by victims of state-sponsored terrorism" without requiring any commercial conduct, §1610(a)(7) and (b)(3) would "serve no purpose at all." *Id.* at 27a-28a. That result was particularly improbable because Congress amended §1610(a)(7) and (b)(3) at the same time it enacted §1610(g) in 2008—amendments that would have been pointless if petitioners' construction of §1610(g) were correct. *Id.* at 28a n.5.

3. The court of appeals noted that the Ninth Circuit had reached a contrary result in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016). Pet. App. 32a-33a. The Ninth Circuit "purported to explain away the 'as provided in this section' language in subsection (g) by interpreting it to apply only to §1610(f)." *Id.* at 33a.

The Seventh Circuit rejected that construction as a "highly strained interpretation." *Ibid.* First, "it implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" *Ibid.*

"Second, and importantly, § 1610(f) *never became operative*"—the President issued a blanket waiver the day the provision was enacted. Pet. App. 33a. As a result, § 1610(f) "does not allow *any* form of execution." *Id.* at 34a. "It therefore makes no sense to say, as the *Bennett* majority does, that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

The court thus concluded that "Section 1610(g) is not itself an exception to execution immunity." Pet. App. 35a. Instead, it merely "abrogates the *Bancec* rule for terrorism-related judgments." *Ibid.* "Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state's property *and* the property of its agency or instrumentality—without regard to the *Bancec* presumption of separateness—but they must do so 'as provided in this section.'" *Ibid.* "That is, they must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b)." *Ibid.*

SUMMARY OF ARGUMENT

Congress enacted § 1610(g) to permit certain terrorism plaintiffs to execute against sovereign and instrumentality assets without regard to the customary presumption of separate status this Court recognized in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Con-

gress did not eliminate the rules of sovereign immunity for terrorism judgments altogether.

I.A. While foreign state assets are generally immune from execution, § 1610 sets forth narrow exceptions to that immunity. Section 1610(g) then provides that, for certain terrorism judgments, "the property of a foreign state * * * and the property of an agency or instrumentality of such a state, including property that * * * is an interest held directly or indirectly in a separate juridical entity," is subject to execution "*as provided in this section, regardless of*" five factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1) (emphasis added). That provision is clear: Assets are subject to execution "regardless of" *Bancec*'s presumption of separate status. But they are subject to execution only "as provided in this section"—*i.e.*, consistent with *existing* immunity rules in § 1610. Section 1610(g)(1) does not say that property is "not immune" or that it is subject to execution "regardless of" the FSIA's immunity principles generally. Indeed, it does not mention immunity at all.

B. Petitioners' claim that § 1610(g) is a freestanding immunity exception ignores the provision's statutory context. Congress enacted § 1610(g) in § 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338. That same statute also created the new exception to jurisdictional immunity for terrorism claims in § 1605A, and it amended the FSIA's existing exceptions to execution immunity to make them available for § 1605A judgments. *Id.* § 1083(a), (b)(3)(A)-(C), 122 Stat. at 338-341. Petitioners' construction of § 1610(g) would render the amendments to the execution immunity provisions superfluous. Those exceptions each impose specific requirements—for example, § 1610(a)(7)'s requirement that property be used

for a commercial activity. There would be no reason for Congress to adjust those existing immunity exceptions to cover § 1605A judgments if § 1610(g) permitted plaintiffs to execute § 1605A judgments against *all* property with no further requirements at all.

C. Petitioners' construction finds no support in the legislative history. That history shows that Congress enacted § 1610(g) to eliminate *Bancec*'s focus on domination and control as the standard for piercing the corporate veil, replacing it with a test of "simple" or "beneficial" ownership. There is no evidence that Congress also intended to abrogate the longstanding commercial activity requirement for overcoming execution immunity.

II.A. Petitioners' contrary arguments are meritless. Petitioners offer no plausible explanation for § 1610(g)'s inclusion of the phrase "as provided in this section." They barely defend the Ninth Circuit's theory that the phrase refers to subsection (f)—a construction that implausibly reads "this section" to refer to a particular *subsection* and renders § 1610(g) wholly inoperative. Petitioners' new theory that "this section" refers to NDAA § 1083 attributes remarkable drafting incompetence to Congress and still fails to give any meaningful effect to the phrase "as provided in this section." Finally, amici's theory that the phrase refers only to *procedural* provisions fares no better. Section 1610(g) draws no distinction between substance and procedure—it refers broadly to § 1610, a section that focuses overwhelmingly on *substantive* immunity standards.

B. Petitioners likewise have no response to the surplusage their construction would create. They assert that § 1610(a)(7) and (b)(3) would not be superfluous *as currently codified* because they apply to both old § 1605(a)(7) judgments and new § 1605A judgments, while § 1610(g)

applies only to the latter. But that misses the point. The *2008 amendments* were superfluous under petitioners' construction because Congress would have had no reason to *amend* the FSIA's exceptions to execution immunity to refer to §1605A if plaintiffs with §1605A judgments could invoke a blanket exception under §1610(g).

C. Section 1610(g)'s *Bancec* factors are not irreconcilable with the commercial activity requirement; the two tests address different issues. The claim that §1610(g) may not enhance plaintiffs' opportunities for execution under each and every subsection of §1610 is beside the point. And the claim that the Seventh Circuit's interpretation renders certain language in §1610(g) superfluous is incorrect. Deleting that language would render the statute incomprehensible. In any event, §1610(g)'s phrasing was a reasonable way for Congress to convey its intent: that sovereign property and instrumentality property should be equally subject to execution without regard to the *Bancec* presumption that would ordinarily require treating them differently.

III.A-B. Petitioners' construction is a dramatic departure from the traditional restrictive theory of immunity. It would put the United States in violation of international law. This Court should insist on a clear indication of Congress's intent before countenancing such a result.

C-D. The facts of this case demonstrate the extreme consequences of petitioners' construction. Cultural artifacts are the opposite of commercial property and traditionally were never thought subject to execution. As the Executive Branch has warned, expansive constructions of immunity exceptions threaten United States interests by encouraging reciprocal actions by foreign governments.

ARGUMENT

Petitioners seek to satisfy their default judgment by seizing ancient Persian artifacts loaned to an American museum almost a century ago for academic study. That sort of cultural property—a nation's historic patrimony—has long been immune from execution. Instead, execution has historically been limited to commercial property and commercial entities. Nothing in § 1610(g) contemplates the dramatic departure from well-accepted immunity principles that petitioners now propose.

Section 1610(g)'s text, structure, and history all make clear that the provision addresses an entirely different issue. For decades, this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), precluded plaintiffs from seizing instrumentality assets to satisfy judgments against a sovereign except in narrow circumstances. Section 1610(g) modifies that rule of substantive law for certain terrorism cases by providing that property of the sovereign *and* its instrumentalities is subject to execution "as provided in this section, regardless of" five factors associated with *Bancec*. 28 U.S.C. § 1610(g)(1). Petitioners seek to rewrite that provision so that it renders property subject to execution not only "regardless of" *Bancec* but "regardless of" immunity principles generally.

That is not what § 1610(g) says. The provision says nothing about immunity at all—it addresses only the *Bancec* rule. To the extent there is any doubt, it is eliminated by the provision's context, its legislative history, and this Court's repeated admonitions against construing statutes in a way that violates international law.

I. THE TEXT, STRUCTURE, AND HISTORY OF § 1610(g) SHOW THAT IT IS AN EXCEPTION TO *BANCEC*, NOT A FREESTANDING IMMUNITY EXCEPTION

Section 1610(g) is not a freestanding immunity exception. Rather, it accomplishes a more modest goal: abrogating *Bancec*'s presumption of separate status for certain terrorism judgments.

A. Section 1610(g)'s Text Is Clear

Section 1609 establishes the general rule that assets of a sovereign and its instrumentalities are immune from execution. 28 U.S.C. § 1609. Section 1610 sets forth narrow exceptions to that execution immunity—for example, where property is used for a commercial activity and other conditions are met. *Id.* § 1610. Section 1610(g) then provides that, where a terrorism judgment is entered against a foreign state under § 1605A, the property of that state *and* its agencies and instrumentalities is subject to execution "as provided in this section, regardless of" the five *Bancec* factors. *Id.* § 1610(g)(1).

There is only one plausible interpretation of that text: Where an asset is subject to execution "as provided in this section"—that is, pursuant to the immunity exceptions in § 1610—a plaintiff may execute against the asset "regardless of" the *Bancec* factors that would otherwise limit execution to property of the sovereign itself. Section 1610(g) does not say, as petitioners would have it, that plaintiffs can seize assets "regardless of" immunity principles generally. Congress exempted certain plaintiffs from meeting the traditional criteria for piercing an instrumentality's corporate veil. But those plaintiffs still must prove that the property they seek to seize falls within one of § 1610's exceptions to immunity.

1. Congress enacted §1610(g) against the backdrop of this Court's decision in *Bancec*. The question in that case was whether a Cuban state-owned bank could be held liable for claims against the Cuban government. 462 U.S. at 613. Invoking substantive principles of international and domestic law, this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. The Court identified only two narrow exceptions: where an entity is "so extensively controlled by its owner that a relationship of principal and agent is created," and where the sovereign abuses the corporate form to "'work fraud or injustice.'" *Id.* at 629. Lower courts distilled that holding into five "factors" that determine whether the presumption of separate status has been overcome. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992).

Viewed against that backdrop, §1610(g)'s obvious purpose was to abrogate *Bancec*'s presumption of separate status for terrorism judgments. Section 1610(g) provides that, where a plaintiff obtains a terrorism judgment against a foreign state under §1605A, "the property of [the] foreign state * * * *and* the property of an agency or instrumentality of [the] state, including property that * * * is an interest held directly or indirectly in a separate juridical entity," is subject to execution "*as provided in this section, regardless of*" five factors. 28 U.S.C. §1610(g)(1) (emphasis added). "[T]he five factors made irrelevant by subsection (g) mirror almost exactly the factors developed by the lower courts under the *Bancec* doctrine." Pet. App. 25a; compare 28 U.S.C. §1610(g)(1)(A)-(E) with *Flatow*, 308 F.3d at 1071 n.9. The meaning of Congress's

directive that § 1605A judgments may be executed against sovereign *and* instrumentality assets "regardless of" those five factors is obvious: *Bancec*'s presumption of separate status does not apply.

2. Nothing in § 1610(g) suggests that Congress went further and abrogated the immunity of all sovereign and instrumentality assets from execution on terrorism judgments. Section 1610(g) provides that assets are subject to execution only "as provided in this section"—*i.e.*, under the existing immunity rules in § 1610. 28 U.S.C. § 1610(g)(1). And it states that assets are subject to execution "regardless of" the five *Bancec* factors—not regardless of § 1610's requirements generally. *Ibid.*

Section 1610 lists a series of exceptions to execution immunity, each with specific requirements. Section 1610(a), for example, sets forth rules for overcoming the immunity of a foreign state's assets, in each case requiring that they be "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(g)'s statement that assets are subject to execution "as provided in this section" thus means execution under those traditional criteria. Similarly, § 1610(c) requires that a sovereign be afforded a reasonable opportunity to pay a judgment before the court authorizes execution. *Id.* § 1610(c). Section 1610(g) incorporates that requirement too.

In each case, the plaintiff can execute against assets of the state and its juridically distinct instrumentalities "regardless of" *Bancec*'s presumption of separate status. 28 U.S.C. § 1610(g)(1). But the assets must still be subject to execution "as provided in" § 1610. *Ibid.* Had Congress intended § 1610(g) to be a freestanding immunity exception, it would have provided that property is subject to execution "regardless of" the Act's immunity provisions. Instead it did the opposite, providing that property is

subject to execution "regardless of" the *Bancec* factors but only "as provided in" § 1610 itself.

If a state college created a scholarship program that set forth certain academic eligibility criteria, and then provided that all graduate students were eligible for a scholarship "as provided in this section, regardless of" their state of residence, no one would suggest that the proviso meant that graduate students do not have to comply with the academic criteria at all. Rather, the plain meaning would be that graduate students must comply with the same academic requirements as everyone else. The proviso merely singles out another potentially relevant factor—the state of residence—and excludes it from consideration. Section 1610(g) functions the same way.

3. Where Congress modified immunity elsewhere in the FSIA, it used language clearly indicating that intent. Section 1609 states the general rule that foreign state property "shall be immune." 28 U.S.C. § 1609. And § 1610's exceptions identify certain types of property that "shall not be immune." See *id.* § 1610(a) (property "shall not be immune * * * from execution" if used for commercial activity and other requirements met); *id.* § 1610(b) (property of instrumentality engaged in commercial activity "shall not be immune * * * from execution" if other requirements met); *id.* § 1610(d) (certain property "shall not be immune from attachment prior to the entry of judgment"); *id.* § 1610(e) (vessels "shall not be immune from * * * execution"). If Congress had intended § 1610(g)(1) to be a freestanding *immunity* exception, it would have used similarly clear language. But the provi-

sion does not mention immunity at all.[3]

Congress had good reason not to use the term "immunity" in § 1610(g)(1). The provision does not address immunity at all. It addresses a distinct question: whether courts must respect the separate juridical status of instrumentalities. As *Bancec* explained, the presumption of separate status is not a rule of immunity, but a principle of *substantive law* that prohibits holding one entity liable for another's debts. 462 U.S. at 620 (FSIA "not intended to affect the substantive law determining the liability of a foreign state or instrumentality"). Because Congress's goal in § 1610(g) was to abrogate *Bancec* for certain cases, it made perfect sense to enact a provision that altered only that *substantive law* principle—while still requiring plaintiffs to comply with the *immunity* rules "as provided in" § 1610.

If Congress had intended § 1610(g) to be an across-the-board immunity exception, it would have said so. It could have stated that, for plaintiffs with § 1605A judgments, property of the sovereign and its instrumentalities "shall not be immune." Or it could have declared that such property is "not immune" *and* subject to execution "regardless of" *Bancec*. Congress did the opposite. It provided that property is subject to execution only "as provided in this section"—subjecting the property to the immunity provisions in § 1610—while limiting the "re-

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[3] In some instances, Congress provided for execution "[n]otwithstanding any other provision of law"—language that has been construed to permit execution notwithstanding another provision that grants immunity. See 28 U.S.C. § 1610(f)(1)(A); 28 U.S.C. § 1610 note § 201(a). But § 1610(g) contains no such language either. See *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016) ("Section 1610(g) does not take precedence over 'any other provision of law,' as the TRIA does.").

gardless of" clause to the five *Bancec* factors. 28 U.S.C. § 1610(g)(1).

B. Congress's Contemporaneous Amendments to the FSIA Confirm That § 1610(g) Is Not a Free-standing Immunity Exception

At the same time Congress enacted § 1610(g), it made several other changes to the FSIA. Construing § 1610(g) to be a freestanding immunity exception would render several of those amendments wholly superfluous.

Congress enacted § 1610(g) as part of § 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 3, 338. That legislation did several things. First, it created a new exception to *jurisdictional* immunity for terrorism claims codified at 28 U.S.C. § 1605A, replacing the prior exception at § 1605(a)(7). See *id.* § 1083(a), 122 Stat. at 338. Section 1605A expanded the remedies for terrorism plaintiffs, providing an express federal cause of action, authorizing punitive damages, and providing for liens of *lis pendens*. 28 U.S.C. § 1605A(c), (g).

At the same time, Congress systematically revised the existing exceptions to execution immunity to make them available to plaintiffs with judgments under new § 1605A. For example, § 1610(a)(7) had previously denied immunity where plaintiffs holding terrorism judgments under § 1605(a)(7) sought to execute against property used for a commercial activity in the United States. Congress amended that provision by deleting the reference to § 1605(a)(7) and replacing it with a reference to new § 1605A. Pub. L. No. 110-181, § 1083(b)(3)(A), 122 Stat. at 341. As a result, § 1610(a)(7) applied to plaintiffs with terrorism judgments under new § 1605A—but *only* if the property was used for a commercial activity in the United

States. Congress made similar changes to other parts of §1610 as well. See *id.* §1083(b)(3)(B)-(C), 122 Stat. at 341.

Petitioners' construction of §1610(g) renders those changes wholly superfluous. Petitioners contend that §1610(g) is an across-the-board immunity exception that permits execution of §1605A judgments against sovereign and instrumentality assets with no further requirements. If that were correct, however, there would have been no reason for Congress to tinker with existing immunity exceptions to make them available to plaintiffs with §1605A judgments.

Each of those pre-existing exceptions has specific requirements, such as commercial use of the property in the United States. 28 U.S.C. §1610(a)(7). No plaintiff with a §1605A judgment would bother to invoke those other provisions, and undertake the burden of proving those additional requirements, if §1610(g) abrogated immunity regardless. What plaintiff would expend the effort to prove that a sovereign used property for a commercial activity under §1610(a)(7) if §1610(g) abrogated immunity with no further showing at all? Petitioners' construction thus renders multiple provisions of NDAA §1083 pointless and inexplicable.

"[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant * * * ." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (quotation marks omitted); see also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). Petitioners' construction flouts that principle. This Court ought not adopt a con-

struction that requires it to dismiss numerous careful revisions in the NDAA as pointless.

Viewing NDAA §1083 as a whole, Congress's plan is not hard to discern. Congress created a new exception to jurisdictional immunity; it adjusted the existing exceptions to execution immunity to be compatible with judgments entered under that new provision; and it suspended *Bancec*'s substantive-law presumption of separate status for those same judgments. Petitioners' construction of §1610(g) wrenches that provision from its statutory context and ascribes it a meaning that neither its text nor its broader context can sustain.

C. Section 1610(g)'s History Confirms That Congress Merely Sought To Abrogate the *Bancec* Presumption for Terrorism Judgments

To the extent any doubt remains—and none does—§1610(g)'s history erases it. While petitioners assert that Congress enacted §1610(g) to overcome the "formidable impediment[]" of the commercial activity requirement, Pet. Br. 58-61, they cite not one passage of legislative history mentioning that goal. Section 1610(g)'s history in fact shows that Congress enacted the provision for a different purpose: abrogating *Bancec*'s presumption of separate status.

1. The legislation that eventually became §1610(g) was proposed by Senators Specter and Lautenberg in 2005. S. 1257, 109th Cong. §2 (2005); see also H.R. 865, 109th Cong. §2 (2005) (House version). Senator Specter explained that the provision was designed to "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism * * * by *changing the legal standard of the Bancec doctrine* from day to day managerial control to those under the beneficial ownership of the

state." 151 Cong. Rec. 12,869 (June 16, 2005) (emphasis added). In *Bancec*, he explained, "the U.S. Supreme Court created a presumption against a party that seeks to satisfy an outstanding judgment against a foreign government." *Ibid.* The bill would "ease the burden on the families of victims of terrorism by permitting them to attach the hidden assets of terrorist states." *Ibid.* Nowhere did Senator Specter mention the commercial activity requirement or any specific objective other than abrogating *Bancec*.

Three years later, Senator Lautenberg persuaded the Senate to attach the bill to defense appropriations legislation. See 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (claiming authorship). He too explained § 1610(g) solely in terms of abrogating *Bancec*:

> The *misapplication of the "Bancec doctrine"* * * * has in the past erroneously protected the assets of terrorist states from attachment or collection. For example, in Flatow v. Bank Saderat Iran, the Flatow family attempted to attach an asset owned by Iran through the Bank Saderat Iran. Although Iran owned the Bank Saderat Iran, the court, relying on *the State Department's application of the Bancec doctrine*, held that the Flatows could not attach the asset because they could not show that Iran exercised day-to-day managerial control over Bank Saderat Iran. My provision will remedy this issue by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a "simple ownership" test.

Ibid. (emphasis added); see also H.R. Rep. No. 110-477, at 1001 (2007) (provision would apply to "any property interest in which the foreign state enjoys a beneficial ownership"). Nowhere did Senator Lautenberg mention

the commercial activity requirement or any intent to modify immunity rules.

Petitioners invoke the portion of that legislative history that mentions a "simple ownership" or "beneficial ownership" test. Pet. Br. 57. But they misunderstand that language. Under *Bancec*, courts could disregard an instrumentality's separate status if the entity was "so extensively controlled by its owner that a relationship of principal and agent is created." 462 U.S. at 629. One of the five *Bancec* factors was thus "the degree to which government officials manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7. The legislative history that petitioners invoke merely explains that, in enacting § 1610(g), Congress was replacing that focus on domination and control with a "simple ownership" or "beneficial ownership" test. In Senator Specter's words, the legislation "chang[ed] the legal standard of the Bancec doctrine from *day to day managerial control* to *[assets] under the beneficial ownership of the state*." 151 Cong. Rec. 12,869 (June 16, 2005) (emphasis added); see also 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (replacing focus on "day-to-day managerial control" with "'simple ownership' test"). Nowhere did anyone suggest that § 1610(g) replaced the requirements for overcoming *immunity*—such as commercial activity—with a "simple ownership" test.

2. Tellingly, the day after the President signed the NDAA into law, Senator Lautenberg issued a press release that directly refutes petitioners' interpretation. See Press Release, *Lautenberg-Specter Bill To Provide Justice for Victims of State-Sponsored Terrorism Signed into Law* (Jan. 29, 2008), available at https://votesmart.org/public-statement/315541. The press release declared that "[t]he new law will * * * allow the seizure of hidden

commercial assets belonging to terrorist states so victims of terrorism can be justly compensated" and would "allow[] these victims to seize hidden *commercial* assets for compensation if they win judgments in court." *Ibid.* (emphasis added). The legislation's author and sponsor thus understood that § 1610(g) did not eliminate the customary commercial activity requirements for overcoming immunity from execution.

The Congressional Research Service reached the same conclusion just months later. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* (Aug. 8, 2008). Its report notes that the statute "address[es] which property of foreign States is subject to levy in execution of terrorism judgments." *Id.* at 54. The report immediately adds: "In order for property to be attached, *it must also fall under an exception to sovereign immunity or otherwise fail to qualify for immunity.*" *Id.* at 54 n.208 (emphasis added). The report then discusses the commercial activity limitations of § 1610(a)(7) and (b)(2) (now (b)(3)) in detail. *Ibid.* Petitioners and their amici cite that report seven times, but they overlook the key passage addressing the precise issue at hand.

If Congress had intended § 1610(g) to be a freestanding immunity exception that eliminated the commercial activity requirement, there would be some trace of that intent in the legislative history. There is none. The legislation's author and sponsors were clear: Section 1610(g) was designed to abrogate *Bancec* for certain terrorism judgments—and nothing more.

II. Petitioners' Contrary Arguments Lack Merit

Petitioners' contrary arguments defy §1610(g)'s text and broader context.

A. Petitioners Offer No Plausible Construction of the Phrase "As Provided in This Section"

Petitioners struggle to avoid reading the phrase "as provided in this section" out of the statute entirely. The plain meaning of that phrase is obvious. Section 1610 sets forth a series of exceptions to execution immunity. By providing that sovereign and instrumentality assets are subject to execution on §1605A judgments "as provided in this section, regardless of" *Bancec*, Congress made clear that §1610(g) abrogates only *Bancec*'s presumption of separate status, while still requiring plaintiffs to comply with the immunity rules set forth in §1610. Petitioners hypothesize various alternative meanings for that phrase. But their proposals are implausible.

1. *"As Provided in This Section" Does Not Refer to §1610(f)*

Petitioners half-heartedly reprise the theory the Ninth Circuit adopted in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), cert. pending, No. 16-334. Pet. Br. 44-45. The Ninth Circuit held that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in §1610(f)." 825 F.3d at 959. As the Seventh Circuit recognized, that is a "highly strained interpretation" that "makes no sense." Pet. App. 33a-34a.

As an initial matter, the Ninth Circuit's interpretation "implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" Pet. App. 33a. That cannot be right. "[F]rom the earliest days of the Republic, the

text of a law * * * has been divided into sections"—the "most fundamental division of federal law." M. Douglass Bellis, Federal Judicial Center, *Statutory Structure and Legislative Drafting Conventions* 8 (2008). "A section in turn is normally divided into subsections * * * designated by lowercase letters: '(a),' '(b),' etc." *Ibid.* Thus, § 1609, § 1610, § 1611, and so on are "sections," while their subdivisions (§ 1610(a), § 1610(b), etc.) are "subsections." The phrase "as provided in this section" appears in a particular *section* of the U.S. Code—§ 1610. Thus, "*this* section" can only refer to § 1610, not *sub*section (f).[4]

Petitioners' construction is particularly implausible given that § 1610(f)(1) "*never became operative.*" Pet. App. 33a. Immediately after Congress enacted the provision, the President issued a blanket waiver. See 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). It is fanciful to suppose that Congress used the phrase "this section" to refer *exclusively* to a subsection of § 1610 that never went into effect. Moreover, "subsection (f), being inoperative from the start, does not allow *any* form of execution." Pet. App. 34a. "It therefore makes no sense to say * * * that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

Petitioners' amici respond that one paragraph within § 1610(f)—§ 1610(f)(2)—remains operative despite the waiver. See FDD Br. 4, 8. But paragraph (f)(2) contains no execution mechanism. It merely encourages federal

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[4] Congress was clearly aware of that terminology: It used the term "subsection" elsewhere in § 1610(g) when referring to a specific subsection within § 1610. See 28 U.S.C. § 1610(g)(3) ("Nothing in this *sub*section * * * ." (emphasis added)).

agencies to "assist [plaintiffs] * * * in identifying, locating, and executing against" assets. 28 U.S.C. § 1610(f)(2). Execution "as provided in" paragraph (f)(2) thus would still mean no execution at all.

2. *"As Provided in This Section" Does Not Refer to NDAA § 1083*

Petitioners now invent a new theory—that "'this section' refers to the entirety of section 1083 of the NDAA of 2008," the public law that contained § 1610(g). Pet. Br. 45. That implausible theory would require this Court to impute to Congress a remarkable degree of drafting incompetence.

Congress did not use the phrase "as provided in this section" in some uncodified provision of the NDAA. The phrase appears in language that Congress directed to be *inserted into the U.S. Code*. "Section 1610 of title 28, United States Code," Congress declared, "is amended * * * by adding at the end the following: * * *." Pub. L. No. 110-181, § 1083(b)(3), (3)(D), 122 Stat. at 341. Congress thus plainly intended that the phrase "as provided in this section" would appear in a particular section of the U.S. Code, and that the phrase "this section" would therefore refer to that Code section—*i.e.*, to § 1610. Congress would not have used the phrase "this section" in the *codified* text of § 1610(g) to refer to a section of an *uncodified* public law.

Another provision of the same statute makes that clear. In § 1605A, Congress repeatedly used the phrase "this section" to refer to the Code section, while expressly referencing the NDAA when it wanted to cite uncodified provisions of the public law:

> CLAIM HEARD.—The court shall hear a claim under *this section* if * * * in the case of an action that is

> refiled under *this section* by reason of *section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008* or is filed under *this section* by reason of *section 1083(c)(3) of that Act*, the foreign state was designated as a state sponsor of terrorism * * * .

28 U.S.C. §1605A(a)(2)(A)(i)(II) (emphasis added). Congress clearly appreciated that, when inserting text into the U.S. Code, "this section" meant the Code section. When Congress wanted to refer to an uncodified section of the public law, it did so expressly.

Petitioners point out that an earlier draft of the bill used the phrase "this section" in proposed §1610(g) to refer to text in §1605A. Pet. Br. 45-46. But they admit that Congress changed the reference from "this section" to "section 1605A" later in the drafting process. *Id.* at 46. "[O]ne could claim that the inconsistency was detected and corrected" in the final version. *Ibid.* Yes, one could—and that claim would be correct. The fact that Congress perceived the need to "correct[ ]" the error refutes rather than supports petitioners' interpretation.[5]

Construing "this section" to refer to NDAA §1083, moreover, does not overcome the fundamental flaw in petitioners' construction: It still leaves the phrase "as provided in this section" with no coherent purpose or meaning. Petitioners speculate that Congress might have been referring to the portions of §1605A that authorize claims for "punitive damages, claims for property loss,

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[5] Petitioners note that various *uncodified* provisions of NDAA §1083 use the phrase "this section" to refer to §1083. Pet. Br. 47. That proves nothing. When Congress uses the phrase "this section" in *un*codified text, the term necessarily refers to the public law. But when Congress uses the phrase in text designed to be inserted verbatim into the U.S. Code, the term refers to the Code section.

and various insurance-related claims." Pet. Br. 48 (citing 28 U.S.C. § 1605A(c), (d)). But those provisions have nothing to do with execution; they define the types of damages available in an action under § 1605A. It makes no sense—grammatically or legally—to say that assets are subject to execution "as provided in" a provision that defines the types of damages a plaintiff can seek rather than the requirements for execution.[6]

3. *"As Provided in This Section" Does Not Refer Solely to Procedural Provisions in § 1610*

Petitioners' amici offer yet a third interpretation. They claim that "as provided in this section" refers to the *procedures* in § 1610, while excluding the substantive requirements for overcoming immunity. See Former Officials Br. 23-25; FDD Br. 3-4. That interpretation fares no better.

For one thing, § 1610(g) declares that certain assets are subject to execution "as provided in this section"—not that they are subject to execution "according to the *procedures* in this section," or "in the *manner* provided by this section." 28 U.S.C. § 1610(g). Section 1610(g)'s language draws no distinction between procedural and substantive requirements for overcoming immunity. Moreover, § 1610(g) states only that assets are subject to execution "regardless of" the *Bancec* factors. Consequently, the only barrier § 1610(g) eliminates is *Bancec*.

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[6] Petitioners also claim support from § 1605A(g)'s provision for a lien of *lis pendens*. As petitioners note, an earlier draft of § 1605A(g) did not limit the lien to property subject to execution under § 1610—which they take as an indication that § 1610(g) must be similarly broad. Pet. Br. 48-49. But Congress *revised* § 1605A(g) prior to enactment so that it *was* limited to property subject to execution under § 1610. See *ibid.*; 28 U.S.C. § 1605A(g)(1)(A). That drafting history likewise refutes petitioners' position.

Assets are still subject to execution only "as provided in" § 1610.

Indeed, most of § 1610's provisions concern substantive immunity standards, not procedure. See 28 U.S.C. § 1610(a)(1)-(7), (b)(1)-(3), (d), (e), (f)(1). The only even arguable exceptions are § 1610(c) and (f)(2). It is wholly implausible that Congress would use the broad phrase "this section" to refer exclusively to those two isolated provisions *within* § 1610—particularly since the provisions are a singularly awkward fit for amici's construction.[7]

Finally, amici's theory cannot overcome the other defects in their interpretation. It would still require the Court to dismiss Congress's careful changes to other provisions of § 1610 in 2008 as pointless surplusage. And it finds no support in the legislative history. The theory thus fails for all the same reasons as petitioners'.

B. Petitioners Cannot Avoid the Surplusage Their Construction Creates

Petitioners' effort to avoid creating surplusage likewise fails. As explained above, when Congress enacted § 1610(g), it simultaneously adjusted the scope of various immunity exceptions—each of which imposes specific requirements—to make them compatible with newly enacted § 1605A. Those amendments would have been pointless if § 1610(g) were a freestanding immunity ex-

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[7] Section 1610(c) requires the court to give a sovereign a reasonable time to pay the judgment before allowing execution, but it applies only to "execution referred to in subsections (a) and (b)." 28 U.S.C. § 1610(c). Amici never adequately reconcile that limitation with their theory that "this section" in § 1610(g) *excludes* subsections (a) and (b) but *includes* subsection (c). Section 1610(f)(2), for its part, is not a *procedure for execution* at all—it merely encourages federal agencies to "assist" plaintiffs in locating and executing against assets. 28 U.S.C. § 1610(f)(2); see pp. 34-35, *supra*.

ception that allowed plaintiffs to execute §1605A judgments against *all* property without meeting the specific requirements those other provisions impose. See pp. 27-29, *supra*.

Petitioners urge that their construction does not render §1610(a)(7) and (b)(3) superfluous because those provisions apply to both old terrorism judgments under §1605(a)(7) and new ones under §1605A. Pet. Br. 41. Section 1610(g), by contrast, applies only to new §1605A judgments. *Ibid.* Petitioners speculate that Congress might have preserved §1610(a)(7)'s commercial activity exception for plaintiffs with claims against Iraq, who might not have been able to invoke §1605A or §1610(g). *Id.* at 41-44. That argument fails three times over.

First, whether or not petitioners' construction renders superfluous 28 U.S.C. §1610(a)(7) and (b)(3) *as currently codified*, it clearly renders superfluous the *amendments* that NDAA §1083 made to those provisions in 2008. Those amendments made the commercial activity exceptions in §1610(a)(7) and (b)(3) (then (b)(2)) available to plaintiffs with judgments under new §1605A. There is no rational reason why Congress would have gone to the trouble of making those provisions available to plaintiffs with §1605A judgments—requiring those plaintiffs to prove commercial activity—if, *in the very same statute*, it was also adding a new provision abrogating the immunity of *all* property for those same §1605A judgments *without regard* to commercial activity. "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). Petitioners' construction violates that canon egregiously—regardless of what §1610(a)(7) and (b)(3) currently provide.

Second, when Congress amended § 1610(a)(7) and (b)(3) (then (b)(2)) in 2008, it *deleted* the references to old § 1605(a)(7) from those provisions entirely, replacing them with references to § 1605A. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. at 341. It was not until 2012 that Congress added back the references to § 1605(a)(7) so that the immunity exceptions applied to both old judgments and new ones. See Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012). Thus, in 2008 and for four years thereafter, plaintiffs with old § 1605(a)(7) judgments *could not invoke* the exceptions in § 1610(a)(7) and (b)(3). Petitioners' theory that Congress kept those exceptions on the books for the benefit of plaintiffs with old § 1605(a)(7) judgments thus makes no sense.

Finally, even focusing on § 1610(a)(7) and (b)(3) as they exist today, petitioners' construction still violates the canon against superfluity. Those provisions specifically address judgments *under § 1605A*. See 28 U.S.C. § 1610(a)(7) (applicable to judgments "under section 1605A or section 1605(a)(7)"); *id.* § 1610(b)(3) (similar). Even if § 1610(a)(7) and (b)(3) remain relevant for plaintiffs with old § 1605(a)(7) judgments, that does not explain why the provisions refer to § 1605A as well. In petitioners' view, § 1610(g) abrogates immunity for § 1605A judgments, period. If that were correct, no plaintiffs with § 1605A judgments would ever bother trying to overcome immunity by showing commercial activity under § 1610(a)(7) or (b)(3); those plaintiffs could always rely on § 1610(g) instead. Petitioners' construction thus renders § 1610(a)(7) and (b)(3) superfluous to the extent they refer to § 1605A.[8]

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[8] Petitioners' amici assert that § 1610(a)(7)'s reference to § 1605A has independent force because § 1610(a)(7) applies whenever a plaintiff relies on the *immunity exception* in § 1605A, whereas § 1610(g) applies only where a plaintiff relies on the *cause of action* in § 1605A.

C. Construing § 1610(g) Consistent with Its Express Terms Does Not Render It Self-Defeating

Construing § 1610(g) in accordance with its plain language does not render it self-defeating. Section 1610(g) has precisely the effect Congress intended—abrogating *Bancec* for certain terrorism cases while requiring plaintiffs to comply with the rest of the statute.

1. *The Seventh Circuit's Construction Does Not Conflict with § 1610(g)'s* Bancec *Factors*

Petitioners argue that § 1610(g)'s exclusion of the five *Bancec* factors from consideration "cannot be reconciled with a requirement that the property being attached must be used * * * for commercial activities." Pet. Br. 32. Many of the excluded factors, they urge, concern commercial activity—such as "the degree to which officials of the foreign state manage property or otherwise control its daily affairs." *Id.* at 32-33.

Petitioners conflate two distinct questions. The *Bancec* factors are used to assess whether the sovereign exercises such dominion and control over an instrumentality that courts should pierce the corporate veil, holding

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Bennett Plaintiffs Br. 23-25. But amici nowhere explain why § 1610(g)'s reference to judgments "entered under section 1605A" refers only to the cause of action and not the immunity exception. Cf. S. 1257, 109th Cong. § 2 (2005) (referring to "judgment[s] * * * entered under subsection (a)(7) or (h) of section 1605," the immunity exception and cause of action respectively). In any event, amici identify no material difference between the scope of the immunity exception and the scope of the cause of action, and thus no reason to believe Congress focused on any such distinction. Amici claim the difference matters to plaintiffs who are not U.S. nationals, service members, or government employees or contractors because they cannot invoke § 1605A's cause of action. Bennett Plaintiffs Br. 24. But those plaintiffs cannot invoke the immunity exception either. See 28 U.S.C. § 1605A(a)(2)(A)(ii).

the instrumentality substantively liable for a judgment against the sovereign. See *Bancec*, 462 U.S. at 629. The court thus examines factors such as "the level of economic control by the *government* [as opposed to the instrumentality]" and "the degree to which *government* officials [as opposed to instrumentality officials] manage the entity or otherwise have a hand in its daily affairs." *Walter Fuller*, 965 F.2d at 1380 n.7 (emphasis added). If the sovereign's *control* is sufficiently pervasive, courts will disregard the instrumentality's separate status.

Section 1610(a)(7) focuses on a different issue: whether the sovereign (or instrumentality) "use[s] [the property] for a commercial activity in the United States." 28 U.S.C. § 1610(a). Whether property is being put to commercial or non-commercial use is a completely separate issue from whether the sovereign is meddling in the instrumentality's day-to-day affairs. Neither test has any bearing on the other. Petitioners' claim of inconsistency is contrived.

2. *Section 1610(g) Is Not Self-Defeating Merely Because It May Not Enhance Plaintiffs' Position Under Every Provision of § 1610*

Petitioners insist that § 1610(g) must be a freestanding immunity exception because the contrary construction would limit its utility in executing against instrumentality property under § 1610(b). Pet. Br. 33-36. Sections 1610(b)(2) and (3) abrogate the immunity of agency or instrumentality assets where "the judgment relates to a *claim for which the agency or instrumentality* is not immune." 28 U.S.C. § 1610(b)(2), (3) (emphasis added). If the judgment relates to a claim against the instrumentality itself, petitioners urge, there would be no need to overcome the instrumentality's separate status to execute against its *own assets*. Pet. Br. 34-35. Consequently,

the Seventh Circuit's construction of §1610(g) generally will not enhance a plaintiff's remedies under §1610(b)(2) or (3). *Ibid.*

That observation, however, hardly justifies ignoring §1610(g)'s text. Section 1610(g)'s reference to "this section" means §1610, even if plaintiffs will not invoke every subsection of §1610 with equal frequency. Petitioners do not dispute that, even if §1610(g) merely abrogates *Bancec*, *many* provisions of §1610 remain relevant to plaintiffs invoking it. Under §1610(a)(7), for example, property used by the sovereign (or its instrumentality) for a commercial activity in the United States is not immune from execution of a §1605A judgment. Plaintiffs with §1605A judgments against sovereigns thus may well be able to rely on §1610(g) to execute against any instrumentality property that is not immune because it is being put to commercial use. Cf. *Alejandre* v. *Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1282-1289 (11th Cir. 1999) (denying attachment under §1610(a)(7) due to instrumentality's separate status); *Flatow*, 308 F.3d at 1069-1074 (similar); 154 Cong. Rec. 500 (Jan. 22, 2008) (Sen. Lautenberg) (discussing case). Other paragraphs of §1610(a), such as (a)(1) or (a)(3), might also apply (even if they would typically be subsumed within (a)(7)). Section 1610(c) would apply to limit the timing of execution. Section 1610(d) might authorize prejudgment attachment, as petitioners' amici acknowledge. Former Officials Br. 24. And §1610(f)(2)'s assistance provision would apply as well.

Even within §1610(b), paragraph (b)(1)'s waiver exception may apply. Consequently, where an instrumentality engages in commercial activity and has waived its property's immunity, a plaintiff with a §1605A judgment against the sovereign may be able to invoke §1610(b)(1)

to overcome the immunity of the instrumentality's property while relying on §1610(g) to render the instrumentality substantively liable for the judgment against the sovereign. Petitioners concede as much. Pet. Br. 36 (arguing inapplicability of subsection (b) only "absent a waiver of immunity"). As petitioners' amici acknowledge, such waivers may often be relevant in terrorism cases because the U.S. government may insist on them in the course of claims settlement. See Former Officials Br. 24.

Consequently, how §1610(g) interacts with isolated provisions like §1610(b)(2) or (3) is neither here nor there. The Seventh Circuit's interpretation does not render §1610(g) inoperative or practically so. Nor does that interpretation leave so many provisions of §1610 irrelevant that Congress would not plausibly have referred to property subject to execution "as provided in this section." Section 1610(g) interacts with most provisions of §1610. That it may not interact with *all* of them proves nothing.

3. *The Seventh Circuit's Construction Does Not Create Superfluity Within §1610(g)*

Finally, petitioners assert that, if §1610(g) merely abrogated *Bancec*, part of §1610(g) itself would be superfluous. Pet. Br. 37-38. Section 1610(g) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, *including* property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section, regardless of* [the *Bancec* factors].

28 U.S.C. §1610(g)(1) (emphasis added). Petitioners urge that, if §1610(g) merely abrogated *Bancec*, the provisions' initial clauses—such as the reference to property of a foreign state—would be unnecessary: *Bancec* is irrelevant where a plaintiff seeks to execute against such property to satisfy a judgment against the sovereign. Pet. Br. 37-38.

That argument does not demonstrate superfluity. Simply deleting the words "property of a foreign state" would render the statute incomprehensible. So too would deleting the entire phrase "property of a foreign state against which a judgment is entered under section 1605A." The reference to "foreign state" does not merely identify a category of property. It also identifies the entity "against which a judgment is entered under section 1605A"—the "judgment" the statute later refers to when it states that property is subject to execution "upon *that judgment*." 28 U.S.C. §1610(g)(1) (emphasis added). Similarly, removing the reference to "an agency or instrumentality" would render the "including" clause incoherent. Deleting any text would thus make nonsense of the statute.

Petitioners' claim thus is not so much that certain words would be rendered superfluous. It is that one could completely rewrite the statute to express the thought differently or in fewer words. That is insufficient. See *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 236 (2011) (canon against superfluity does not apply merely because "a passage * * * could have been more terse"); *Pub. Citizen, Inc.* v. *Rubber Mfrs. Ass'n*, 533 F.3d 810, 816-817 (D.C. Cir. 2008) (canon inapplicable if it would require "adding words that are not in the statute").

Congress's locution, moreover, makes good sense. Congress enacted §1610(g) to ensure that property that

is not immune under § 1610 would be available to satisfy a terrorism judgment, whether the property is owned by the state itself or by an agency or instrumentality. In other words, property of an agency or instrumentality should be treated the same way as property of the sovereign itself, including where the agency or instrumentality would otherwise be treated as juridically distinct. Section 1610(g)'s phrasing is a reasonable way to convey that concept. By fully describing those categories, Congress identified all the kinds of assets available to satisfy a § 1605A judgment where the requirements of § 1610 are met. Congress exhaustively described the categories so that all of them were accounted for.

In any event, § 1610(g) still provides that assets are subject to execution only "as provided in this section, regardless of" *Bancec*. Petitioners still can offer no plausible construction of the phrase "as provided in this section." Petitioners still seek to rewrite a statute that says that assets are subject to execution "regardless of" *Bancec* to say that assets are subject to execution "regardless of" sovereign immunity generally. Petitioners still cannot explain the surplusage their construction creates elsewhere in NDAA § 1083. Finally, petitioners still cannot explain away what the legislative history shows: that Congress enacted § 1610(g) to abrogate the *Bancec* presumption for certain terrorism judgments, not to create a new blanket exception to immunity.

III. PETITIONERS' CONSTRUCTION DISREGARDS TRADITION AND INTERNATIONAL PRACTICE

Petitioners' inability to reconcile their interpretation with § 1610(g)'s text, structure, and history is reason enough to reject it. But their construction also represents a dramatic departure from traditional domestic and international immunity principles. The specific applica-

tion of the statute here—to seize cultural artifacts on loan to a museum for academic study—underscores the extreme nature of petitioners' position. Given the potential impact on international relations, such an unprecedented departure from settled principles should be countenanced only where Congress makes its intent clear. Congress nowhere indicated such an intent here.

A. Petitioners' Construction Is a Dramatic Departure from the Traditional Restrictive Theory

The restrictive theory of immunity, and its distinction between commercial and non-commercial activity, has been a cornerstone of the FSIA for decades. Congress enacted the FSIA to "codify the so-called 'restrictive' principle of sovereign immunity," under which immunity is "'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R. Rep. No. 94-1487, at 7 (1976); see also *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007) (adoption of restrictive theory a "well-recognized * * * purpose[ ] of the FSIA"). Congress incorporated that distinction between commercial and non-commercial activity into the statute's findings and declaration of purpose: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their *commercial* activities are concerned, and their *commercial* property may be levied upon for the satisfaction of judgments rendered against them in connection with their *commercial* activities." 28 U.S.C. § 1602 (emphasis added).

Congress has been especially vigilant of that distinction in the context of execution. The FSIA's execution exceptions are "narrower" than its jurisdictional exceptions. *Republic of Argentina* v. *NML Capital, Ltd.*, 134

S. Ct. 2250, 2256 (2014). Thus, while the FSIA's original *jurisdictional* exceptions extended to certain tort claims and other matters, all of the *execution* exceptions were restricted from the outset to property "used for a *commercial activity* in the United States" or property of an agency or instrumentality "engaged in *commercial activity* in the United States." Pub. L. No. 94-583, § 4, 90 Stat. 2891, 2892-2893, 2896 (1976) (codified as amended at 28 U.S.C. §§ 1605(a)(4)-(5), 1610(a)-(b)) (emphasis added). Those limitations applied even where the underlying judgment stemmed from heinous tortious conduct. See, *e.g.*, *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 795-799 (2d Cir. 1984) (denying execution despite claims of "state-sponsored terrorism").

Congress has respected that limitation ever since. When Congress created a new jurisdictional exception for terrorism claims in 1996, it enacted corresponding exceptions to execution immunity—but limited the exceptions to property used for a *commercial activity* or instrumentalities engaged in a *commercial activity*. See Pub. L. No. 104-132, § 221(b), 110 Stat. 1214, 1243 (1996) (codified as amended at 28 U.S.C. § 1610(a)(7), (b)(3)). Petitioners point to the recent Justice Against Sponsors of Terrorism Act as evidence that Congress subordinated those traditional limitations to other goals. Pet. Br. 50. But that statute concerns jurisdictional immunity, not execution. See Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (codified at 28 U.S.C. § 1605B). The only context where Congress has permitted execution of terrorism judgments absent commercial activity is property blocked or regulated under economic sanctions statutes. See 28 U.S.C. § 1610(f)(1); 28 U.S.C. § 1610 note § 201(a). Those are assets the Executive Branch has already decided to

restrain—a mechanism of governmental control and accountability that is absent in private litigation.

Construing § 1610(g) as a blanket immunity exception with virtually no restriction on the type of property that may be seized would be a dramatic departure from that tradition. This Court has insisted on clear evidence before concluding that Congress intended to depart from traditional immunity principles. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (rejecting broad construction of immunity exception absent evidence "suggest[ing] Congress intended a radical departure from the[ ] basic principles" of "the 'restrictive' theory of sovereign immunity"). There is no such evidence here.

B. Petitioners' Construction Would Put the United States at Odds with International Law

Petitioners' interpretation would also thwart the FSIA's commitment to international law. A "central premise" of the FSIA is that immunity decisions should be made "on the basis of a statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 94-1487, at 14; see *Helmerich*, 137 S. Ct. at 1319. This Court regularly looks to international standards when interpreting the statute. See, *e.g.*, *Permanent Mission of India*, 551 U.S. at 200. Petitioners' construction creates an irreconcilable conflict with those standards.

International conventions uniformly limit execution to commercial assets. The European Convention on State Immunity permits execution only against property used for "an industrial or commercial activity"—and even then, only if the state has adopted certain optional treaty provisions. European Convention on State Immunity, art. 26, May 16, 1972, E.T.S. No. 74. That Convention is

particularly relevant because it was discussed at length in the FSIA's legislative history. See, *e.g.*, *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 36-50 (June 2, 1976).

The United Nations International Law Commission took the same approach after studying international practices for nearly 15 years. See *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 12, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2). The Commission's Draft Articles on Jurisdictional Immunities of States and Their Property immunize sovereign property from execution unless the state consents to execution, the state earmarks the property for satisfaction of the claim, or "the property is specifically in use or intended for use by the State for other than government non-commercial purposes." *Id.* at 56 art. 18(1).

The U.N. General Assembly formally approved that standard in the U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004). Absent consent or earmarking to satisfy a claim, the Convention permits execution only if "the property is specifically in use or intended for use by the State for other than government non-commercial purposes." *Id.* art. 19. This Court has looked to that Convention as evidence of the "basic principles of international law" the FSIA reflects. See *Helmerich*, 137 S. Ct. at 1320.[9]

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[9] See also Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* art. 4(3) (1991) (conditioning immunity

Foreign nations overwhelmingly respect those limitations. The United Kingdom, for example, permits execution against sovereign property only if it is "in use or intended for use for commercial purposes." State Immunity Act 1978, c. 33, § 13(4); see *SerVaas Inc.* v. *Rafidian Bank*, [2012] UKSC 40, ¶¶ 23-28 (construing provision with reference to FSIA § 1610(a)). The statutes of other nations are similar.[10] And courts abroad regularly follow that rule even absent statutory guidance.[11]

The International Court of Justice recently held that customary international law prohibits execution against a sovereign's non-commercial assets. See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*, 2012 I.C.J. Rep. 99 (Feb. 3). In that case, Greek plaintiffs obtained judgments against Germany for Nazi atrocities committed during World War II; they

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on whether property is "intended for use for commercial purposes"); International Law Association, *Draft Convention on State Immunity*, 22 I.L.M. 287, 291 (1983) (similar).

[10] See, *e.g.*, Foreign States Immunities Act 1985, No. 196, §§ 30, 32 (Australia); State Immunity Ordinance, No. 6 of 1981, § 14(2)(b) (Pakistan); State Immunity Act, ch. 313, § 15(2)-(4) (Singapore); Foreign States Immunities Act 87 of 1981, § 14 (South Africa); Act on Civil Jurisdiction over Foreign States, Law No. 24 of 2009, arts. 17-18 (Japan), translated in 53 Japanese Y.B. Int'l L. 830, 835 (2010).

[11] See, *e.g.*, *Société Sonatrach* v. *Migeon*, Cour de Cassation, 1e civ., Oct. 1, 1985 (France), translated in 77 I.L.R. 525, 527 (1988) (sovereign assets immune from seizure unless "allocated for an economic or commercial activity"); *Abbott* v. *Republic of South Africa*, No. 107/92, S.T.C., July 1, 1992 (Spain), translated in 113 I.L.R. 411, 423, 425-426 (1999); *Condor & Filvem* v. *Minister of Justice*, No. 329, Corte Cost., July 15, 1992 (Italy), translated in 101 I.L.R. 394, 402-403 (1996); *Iraq* v. *Dumez*, Brussels Civ. Ct., Feb. 27, 1995 (Belgium), translated in 106 I.L.R. 284, 290 (1997); *Philippine Embassy Bank Account Case*, No. 2 BvM 1/76, Bundesverfassungsgericht, Dec. 13, 1977 (Germany), translated in 65 I.L.R. 146, 164 (1984).

then restrained property in Italy that Germany owned and used as "a cultural centre intended to promote cultural exchanges." *Id.* ¶¶30-35, 119. The ICJ held that the restraints violated international law. *Id.* ¶¶113-120. Absent consent or earmarking to satisfy the claim, the ICJ ruled, "any measure of constraint may be taken against property belonging to a foreign State [only if] the property in question [is] in use for an activity not pursuing government non-commercial purposes." *Id.* ¶118.

This Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). That canon has special force here given Congress's repeated recognition of international law principles. See *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989) ("[Courts] usually read the exception narrowly in order to preserve the primary operation of the provision."). Construing §1610(g) to be a blanket exception that eliminates immunity for sovereign property of whatever sort would put the provision at odds with customary international law. The statute can and should be construed to avoid that result.

C. Congress's Policy Against Terrorism Cannot Justify Disregarding §1610(g)'s Limitations

Petitioners urge this Court to disregard all of those principles in service of Congress's purported policy of "enabl[ing] terrorism victims to enforce their terrorism judgments to the fullest extent." Pet. Br. 56. But "no legislation pursues its purposes at all costs," and it "frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United*

States, 480 U.S. 522, 525-526 (1987) (per curiam); see also *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 461 (2012) (refusing to expand statute where "Congress has seen fit to proceed in more modest steps").

Congress did enact §1610(g) to expand remedies for terrorism plaintiffs. But it achieved that goal by eliminating *Bancec*'s presumption of separate status. That change by itself significantly expanded the assets available. There is simply no evidence—in the statute's text, structure, or history—that Congress went further and eliminated immunity for virtually all sovereign property.[12]

This case demonstrates how extreme that interpretation would be. The case involves ancient Persian artifacts—from the cradle of civilization—that "contain[] some of the oldest writings in the world." Pet. App. 4a-5a. Iran loaned those artifacts to the University of Chicago for academic study almost a century ago. *Ibid.* The unprecedented seizure of that cultural patrimony to pay off a default judgment offends even the most parsimonious views of sovereign dignity.

Cultural artifacts are the antithesis of commercial property. The U.N. Convention specifically provides that "property forming part of the cultural heritage of the State" or "property forming part of an exhibition of objects of scientific, cultural or historical interest" may not be deemed commercial property subject to execution, unless placed or intended to be placed on sale. U.N. Convention on Jurisdictional Immunities of States and Their

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[12] Nothing in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016), speaks to that question. Section 1610(g) was not at issue in that case, and the parties did not brief the question presented here. This Court's observations in a footnote about §1610(g) "expanding the availability of assets for postjudgment execution" cannot reasonably be read to resolve the issue here. *Id.* at 1318 n.2.

Property, G.A. Res. 59/38, art. 21.1(d), (e). The ICJ proscribed restraint of a "cultural centre" even for claims arising from Nazi war crimes. *Jurisdictional Immunities of the State*, 2012 I.C.J. Rep. 99, ¶¶52, 119; see also *Kingdom of Spain* v. *Company X SA*, Tribunal Fédérale, Apr. 30, 1986 (Switzerland), translated in 82 I.L.R. 38, 43-45 (1990) (annulling attachment of "educational and cultural centre"); Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* 78 (2012).[13]

If the United States loaned a copy of the Declaration of Independence for study or display at the Louvre, it would certainly expect that the document would not be seized to pay off some plaintiff's default judgment. The same respect should be accorded to the cultural heritage of other nations here.

The absurdities of petitioners' construction would not end there. Absent a commercial activity limitation, terrorism plaintiffs could attach property that is critical to sovereign functions, creating serious international friction. See, *e.g.*, *Colella* v. *Republic of Argentina*, No. C 07-80084, 2007 WL 1545204, at *1, *6 (N.D. Cal. May 29, 2007) (rejecting attempt to seize "Tango Zero One"—Argentina's equivalent of Air Force One—because "transport[ing] the president of Argentina" is not a "commercial activity").[14]

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[13] United States law likewise provides special protections to cultural property. See Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605(h)); Immunity from Seizure Act, Pub. L. No. 89-259, 79 Stat. 985 (1965) (codified at 22 U.S.C. § 2459).

[14] Petitioners claim that diplomatic and consular property would remain immune because § 1610(g) would not trump the Vienna Convention. See Pet. Br. 17-18; 28 U.S.C. § 1609 (immunity rules "[s]ubject to existing international agreements to which the United States is a

Nor would those tensions necessarily be limited to property within our borders. Unlike the commercial activity exceptions in § 1610(a) and (b), § 1610(g) contains no express limitation to "property in the United States." 28 U.S.C. § 1610(a), (b). If § 1610(g) were a freestanding immunity exception, plaintiffs might rely on that omission to try to seize even assets located abroad. Cf. *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 536 (2009) (approving turnover order directed to foreign assets). Such efforts can create serious tensions. If Congress had intended § 1610(g) to be a freestanding immunity exception, it would have addressed territorial limits, as it did elsewhere. That Congress did not do so speaks volumes.[15]

D. Petitioners' Interpretation Threatens Important Foreign Policy Interests

Petitioners' interpretation threatens serious consequences for the Executive Branch's ability to manage foreign relations and protect U.S. interests. The Executive Branch has warned that "enlarging the category of property available for * * * execution in the United States invites similar treatment by other countries where our assets may be located." *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Courts & Administrative Practice of the S. Comm. on the Judiciary*, 103d Cong. 10 (June 21, 1994) (Deputy Assistant Attorney General Stuart Schiffer). "The breadth of our

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party"). But the extreme consequences of their construction are not absolved simply because they manage to avoid some *even more* extreme results.

[15] Departing from the legal issues before the Court, petitioners point to certain comments by former trial counsel that they construe as attempting to justify terrorism. Pet. Br. 55. Whatever those statements meant, they were not authorized by Iran. They are not relevant. And no party before this Court is making any such argument.

government's involvement in litigation in foreign courts and the vast amounts of U.S. government property located abroad give us greater risk of exposure than any other country in the world." *Ibid.*

It is thus no surprise that the Executive Branch has repeatedly rejected petitioners' construction of § 1610(g). The United States has filed briefs to that effect in at least three cases in addition to this one. See U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, Dkt. 82 at 1-2 (9th Cir. filed Oct. 23, 2015) ("[S]ection 1610(g) is not a freestanding exception to foreign sovereign immunity; a plaintiff seeking execution must * * * proceed under one or more of the exceptions to immunity separately set out in section 1610."); U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182, Dkt. 24 at 28-29 (9th Cir. filed July 3, 2014) (similar); U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582, Dkt. 51 at 17-21 (2d Cir. filed Nov. 4, 2011) (similar).

This Court "pa[ys] special attention" to the Executive Branch's views on sovereign immunity. *Helmerich*, 137 S. Ct. at 1320; see also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (views "of considerable interest to the Court"). The Court has paid particularly close attention where the Executive has warned of international friction and repercussions. See *Helmerich*, 137 S. Ct. at 1322 (citing Executive Branch's warnings and noting that "[a]t any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world").

Petitioners seek a massive departure from accepted standards so they can execute against sovereign property with virtually no limitations—and no oversight by the Executive. If plaintiffs can seize ancient Persian artifacts

from a museum to pay off a default judgment, little is safe. That is not an example that U.S. law should or does set.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338, provides as follows:

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or

was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action,

damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending ac-

tion pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Fi-

nancing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of

title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

RECORD AND BRIEF.

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No. 16-534

In the Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT THE UNIVERSITY OF CHICAGO

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides foreign states with a jurisdictional immunity against civil actions and a separate execution immunity that protects foreign states' property from execution upon a judgment. Section 1605A of the FSIA abrogates the jurisdictional immunity for certain claims based on terrorist acts in which a foreign state was complicit.

Petitioners seek to enforce a judgment entered pursuant to Section 1605A by executing on the Persepolis Collection, a set of ancient artifacts that are the property of the Islamic Republic of Iran but are in the possession of a museum that is part of the University of Chicago.

The question presented is whether Section 1610(g) of the FSIA abrogates the execution immunity in all cases in which a party seeks to enforce a judgment entered pursuant to Section 1605A, notwithstanding other provisions of the FSIA that provide for a more limited abrogation of execution immunity in such cases.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTORY STATEMENT 1

STATEMENT 2

1. The Foreign Sovereign Immunities Act 2

   a. The distinction between commercial and noncommercial activity 2

   b. The distinction between jurisdictional and execution immunity 4

2. The Proceedings Below 5

SUMMARY OF ARGUMENT 11

ARGUMENT 15

PETITIONERS MAY NOT EXECUTE THEIR JUDGMENT BY SEIZING THE PERSEPOLIS COLLECTION 15

A. The Text And Structure Of The Foreign Sovereign Immunities Act Demonstrate That Section 1610(g) Does Not Abrogate The Sovereign Immunity That Attaches To The Persepolis Collection 15

B. Petitioners Give No Plausible Account Of Section 1610(g) That Supports Their Contrary View 28

C. Petitioners' Interpretation Of Section 1610(g) Is Inconsistent With Fundamental Principles Of Foreign Sovereign Immunity 38

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Alfred Dunhill of London, Inc., v. Republic of Cuba, 425 U.S. 682 (1976) 3

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) 21

Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *cert. pending*, No. 16-334 28

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) 38, 39, 41

Corley v. United States, 556 U.S. 303 (2009) 20

First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) . . . *passim*

Flatow v. Islamic Republic of Iran, 308 F. 3d (9th Cir. 2002) 9

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) 4

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 3, 4, 39

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 2

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 2, 39

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 2, 3, 39

Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,
965 F.2d 1375 (5th Cir. 1992). 9, 10

STATUTES

28 U.S.C. § 1330 2

28 U.S.C. § 1602 ..... 2, 3, 39

28 U.S.C. § 1603(a) 36

28 U.S.C. § 1603(b) 36

28 U.S.C. § 1604 4

28 U.S.C. § 1605(a)(2) 5

28 U.S.C. § 1605(a)(7) ..... *passim*

28 U.S.C. § 1605A ..... *passim*

28 U.S.C. § 1609 ..... *passim*

28 U.S.C. § 1610 ..... *passim*

28 U.S.C. § 1610(a) 8, 15, 16, 18, 22

28 U.S.C. § 1610(a)(1) 16

28 U.S.C. § 1610(a)(2) 5, 16

28 U.S.C. § 1610(a)(7) ..... *passim*

28 U.S.C. § 1610(b) 15, 22

28 U.S.C. § 1610(b)(3) 10, 11, 24, 25, 32

28 U.S.C. § 1610(d) 22

28 U.S.C. § 1610(e) 15, 22

28 U.S.C. § 1610(f) 15, 28, 29

28 U.S.C. § 1610(f)(1) 13, 21, 28

28 U.S.C. § 1610(f)(3) 29

28 U.S.C. § 1610(g) 1, 11, 15, 21, 28

28 U.S.C. § 1610(g)(1) ..... *passim*

28 U.S.C. § 1610(g)(2) 23

28 U.S.C. § 1611 4

28 U.S.C. § 1611(a) 4

28 U.S.C. § 1611(b) 4

28 U.S.C. § 1611(c) 4

50 U.S.C. § 1701 21

50 U.S.C. § 1702 21

50 U.S.C. § 4305(b) 21

Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 16, 17

Iran Threat Reduction and Syrian Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 34

Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. at 2681-92 29

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 ..... 17, 25, 29, 30, 33

Pub. L. 107–297 21

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat 29

OTHER AUTHORITIES

H.R. Rep. 94-1487, 94th Cong., 2nd Sess. 8 (1976) 5, 39

Jurisdictional Immunities of the State (Germany v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012* 40

Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998) 29

Presidential Determination No. 2001- 03, 65 Fed. Reg. 66,483 (Oct. 28, 2000) 29

United Nations Convention on Jurisdictional Immunities of States and their Properties , Art. 19, sec. (c) 40

INTRODUCTORY STATEMENT

Petitioners in this case seek to execute a judgment against respondent Iran by seizing the Persepolis Collection, Persian artifacts that are the property of Iran but that have been in the possession of the Oriental Institute at the University of Chicago for eighty years. Petitioners assert that Section 1610(g) of the Foreign Sovereign Immunities Act abrogates sovereign immunity and thereby permits petitioners to seize these artifacts. The University maintains that Section 1610(g) has no such effect.

Petitioners obtained their judgment on the basis of injuries inflicted on them by a terrorist attack in which Iran was complicit. Petitioners, and the amici curiae supporting them, emphasize the importance of combatting terrorism, of depriving terrorist organizations and their state sponsors of funds, and of compensating the victims of terrorism. The University of course acknowledges the great importance of these interests. But as the Foreign Sovereign Immunities Act recognizes, there are important and independent countervailing interests as well. Congress took these competing interests into account when it enacted the FSIA.

In this case, Iran long ago entrusted the Persepolis Collection, which dates from approximately 500 B.C.E., to the University for study and publication. The Collection is part of the cultural patrimony not just of Persia and Iran but of humankind. The University supports the claim of sovereign immunity in this case so that it may continue to carry out its core missions of research and teaching, and so that it may maintain ties to individuals and institutions in other nations who

share the University's commitment to the advancement of human knowledge.

STATEMENT

1. The Foreign Sovereign Immunities Act

a. The distinction between commercial and noncommercial activity

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, codifies the "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). The Court has, on several occasions, described the background of the FSIA. See, *e.g.,* id. at 486-89. In *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812), the Court, in an opinion by Chief Justice Marshall, ruled that United States courts would not assert jurisdiction over "'a national armed vessel * * * of the emperor of France.'" Id. at 146-47, quoted in *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004). Although Chief Justice Marshall "noted * * * that the outcome might well be different if the case involved a sovereign's *private* property" (*Altmann*, 541 U.S. at 689 n. 10; emphasis in original), *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden*, 461 U.S. at 486. Until the middle of the twentieth century, U.S. courts generally deferred to the State Department in determining whether to allow foreign states and their instrumentalities to be sued, and the State Department "ordinarily requested

immunity in all actions against friendly foreign sovereigns." Ibid.

In 1952, in a document known as the Tate Letter, the State Department announced a change in its policy. The Tate Letter adopted the "restrictive" theory of foreign sovereign immunity. Under that theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." See *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to Opinion of the Court) (reproducing the Tate Letter). The FSIA, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488; see also *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).

In particular, the distinction drawn by the Tate Letter and the restrictive theory—the distinction between public and private acts—is central to the FSIA. The FSIA translates that into a distinction between commercial activity and property, on the one hand, and noncommercial activity and property, on the other. Section 1602 of the FSIA, the statute's "Findings and declaration of purpose," states: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. As the Court summarized this view (one that it described as providing "significant assistance in construing the scope of" the FSIA), the restrictive

theory "would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or a corporation." *Weltover*, 504 U.S. at 613-14.

b. The distinction between jurisdictional and execution immunity

The FSIA establishes two distinct immunities. Subject to certain exceptions, foreign states are "immune from the jurisdiction of the courts of the United States and of the States" (28 U.S.C. § 1604). This jurisdictional immunity bars suits against foreign states. But the FSIA also provides a separate execution immunity: even if a court has lawfully asserted jurisdiction over a foreign state and entered judgment against it, Section 1609 of the FSIA, 28 U.S.C. § 1609, specifies that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided" in Section 1610, 28 U.S.C. § 1610.[1]

The exceptions to the execution immunity "are narrower" than the exceptions to the jurisdictional immunity. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). This is not surprising. However threatening to good relations among nations it might be to subject a foreign state to suit, seizing property belonging to a foreign state is bound to create even greater tensions. In fact, according to the House

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[1] Section 1609 also refers to Section 1611 of the FSIA, which provides that "[n]otwithstanding the provisions of section 1610" certain property of foreign states remains immune from attachment and execution. See 28 U.S.C. § 1611(a), (b), (c). The provisions of Section 1611 are not at issue here.

Report that accompanied the FSIA, even after the Tate Letter, when the restrictive view was official United States policy, the United States still recognized an absolute immunity against execution.[2]

Both sets of immunities in the FSIA, however, rely on the distinction between commercial and noncommercial activity that is central to the history of foreign sovereign immunity. For example, Section 1605(a)(2) of the FSIA abrogates the jurisdictional immunity of a foreign state "in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state" (28 U.S.C. § 1605(a)(2)). Section 1610(a)(2) abrogates the immunity from execution of "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States * * * if * * * the property is or was used for the commercial activity upon which the claim was based." 28 U.S.C. § 1610(a)(2).

2. The Proceedings Below

a. Petitioners are individuals who were injured by a terrorist attack carried out by Hamas in Jerusalem in 1997. Pet. App. 1-2. They sued respondent the Islamic Republic of Iran in the United States District Court for

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[2] See H.R. Rep. 94-1487, 94th Cong., 2nd Sess. 8, 27 (1976) (citations omitted): "Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. * * * [T]he traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. * * * Even after the 'Tate Letter' of 1952, this continued to be the position of the Department of State and of the courts."

the District of Columbia, alleging that Iran provided material support to the attackers. Id. at 2. Petitioners invoked an exception to jurisdictional immunity, now codified at 28 U.S.C. § 1605A, for damages actions against state sponsors of terrorism that provided material support for a terrorist attack.[3] The district court entered a default judgment for $71.5 million against Iran. Pet. App. 2.

Petitioners registered the judgment in the Northern District of Illinois and sought to attach and execute on the Persepolis Collection, a collection of Persian artifacts that are in the possession of respondent the University of Chicago. Pet. App. 6, 8.[4] Iran had lent the Persepolis Collection to the Oriental Institute at the University of Chicago in 1937 for research, translation, and cataloguing, and nearly all of the collection has remained in the possession of the Oriental Institute since then. See id. at 4-5, 46. The collection consists of approximately 30,000 clay tablets and fragments. Id. at 4-5. The tablets and fragments contain some of the oldest examples of human writing in the world. Id.

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[3] Petitioners initially invoked 28 U.S.C. § 1605(a)(7), which provided this exception to jurisdictional immunity when petitioners sued in 2003. Congress later repealed Section 1605(a)(7) and replaced it with 28 U.S.C. § 1605A, which codifies a similar immunity. Pet. App. 5-6. Petitioners converted their Section 1605(a)(7) judgment to a Section 1605A judgment. See Pet. App. 6 n.1, 15, 22.

[4] Petitioners initially tried to attach four collections of artifacts, but the court of appeals ruled that three of those collections were not subject to the attachment proceeding, either because they were outside the territorial jurisdiction of the district court or because they were not Iran's property. See Pet. App. 8-10. Petitioners have not challenged that ruling in this Court.

In order to overcome the execution immunity provided by 28 U.S.C. § 1609, petitioners first invoked Section 1610(a)(7), which provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered in a court of the United States" if the judgment "relates to a claim for which the foreign state is not immune" under the terrorism exception now codified by Section 1605A. Petitioners also invoked Section 1610(g)(1), which, they asserted, is "an independent exception to execution immunity available to victims of state-sponsored terrorism." Pet. App. 7.

b. The district court granted respondents' motion for summary judgment. Pet. App. 71. The district court concluded that the Section 1610(a)(7) exception for "property * * * used for a commercial activity in the United States" applied only to property used by the foreign state itself for a commercial purpose. Pet. App. 50-57. Because Iran did not use the Persepolis Collection for a commercial purpose, the Section 1610(a)(7) exception did not apply to that property, and the property was immune from attachment and execution. See Pet. App. 57. The district court also rejected petitioners' argument that Section 1610(g)(1) is an independent exception to execution immunity. Id. at 60-62.

c. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1-38. The court of appeals, like the district court, rejected petitioners' argument that the "commercial activity" exception in

Section 1610(a)(7) applied to the Persepolis Collection.[5] This Court declined to review that holding by the court of appeals. See Pet. ii; *Rubin v. Iran*, No. 16-534 (June 27, 2017) (certiorari granted limited to Question 1).

The Seventh Circuit then rejected petitioners' argument that Section 1610(g)(1) provided an independent exception to execution immunity in terrorism cases. Section 1610(g)(1) provides in part:

> (1) * * * [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;

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[5] The court of appeals said it was "skeptical that academic study qualifies as a commercial use" but that it would "put that question aside" because "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." Pet. App. 16, 20 (emphasis in original). The court noted that petitioners did not contend that Iran had used the Persepolis Collection for a commercial activity in the United States. Id. at 20-21.

> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The court of appeals explained (Pet. App. 4, 22-26) that this provision was a response to this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). *Bancec* ruled that "government instrumentalities established as juridical entities distinct and independent from their sovereign normally should be treated as such." Id. at 626-27. This presumption could, however, "be overcome in certain circumstances." Id. at 628. In *Bancec* itself, the Court held that the juridically separate status of the government instrumentality involved in that case could be disregarded. Id. at 630-33. But the *Bancec* Court "announce[d] no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." Id. at 633.

The Seventh Circuit noted that in the wake of this Court's decision in *Bancec*, courts of appeals "began to coalesce around a set of five factors for determining when the exceptions" to the *Bancec* rule applied. Pet. App. 23, citing *Flatow v. Islamic Republic of Iran*, 308 F. 3d 1065, 1071 n.9 (9th Cir. 2002), and *Walter Fuller*

Aircraft Sales, Inc., v. Republic of Philippines, 965 F.2d 1375, 1380-82 & n.7 (5th Cir. 1992). The Seventh Circuit then showed that the five subsections of Section 1610(g)(1) corresponded closely to the five factors that the lower courts developed. See Pet. App. 25-26. The court concluded that "Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments." Id. at 26.

The court of appeals rejected petitioners' contention that Section 1610(g)(1) went further and abrogated execution immunity entirely for such judgments. The court noted that Section 1610(g)(1) made property "subject to attachment in aid of execution, and execution * * * *as provided in this section*" (28 U.S.C. § 1610(g)(1) (emphasis added); see Pet. App. 27). The italicized phrase dictated that petitioners had to come within one of the other exceptions in Section 1610, such as Section 1610(a)(7), in order to execute upon Iran's property. Section 1610(g)(1) established that *if* petitioners came within another provision in Section 1610, *Bancec* would not be a barrier to executing upon the property of an instrumentality of Iran. But petitioners' construction of Section 1610(g)(1) effectively read the italicized phrase out of the statute entirely. See Pet. App. 27, 35.

In addition, the court of appeals noted that Section 1610 contains two other exceptions to execution immunity for terrorism-related judgments, both of which are limited to commercial activity: Section 1610(a)(7), which applies to property of a foreign state used for commercial activity in the United States; and Section 1610(b)(3), which applies to the property of an agency or instrumentality of a foreign state engaged in

commercial activity in the United States. See Pet. App. 27-28, citing 28 U.S.C. §§ 1610(a)(7), 1610(b)(3). The court of appeals pointed out that petitioners' interpretation of Section 1610(g) would make those provisions superfluous. See Pet. App. 27-28. In any event, the court of appeals reasoned, the recitation of the five *Bancec*-related factors in Section 1610(g)(1) was evidence that that provision was "a corrective measure * * * plainly aimed at eliminating the *Bancec* barrier" rather than "creating a new and independent exception to execution immunity for all terrorism-related judgments." Pet. App. 26.[6]

SUMMARY OF ARGUMENT

A. The execution immunity provided in the FSIA prohibits petitioners from seizing the Persepolis Collection. Section 1610(a)(7) of the FSIA gives parties like petitioners who hold terrorism-based judgments a clearer path than other judgment creditors have to overcoming a foreign state's execution immunity. But Section 1610(a)(7) still requires a showing that the foreign state's property is "used for a commercial activity in the United States." Petitioners have not made, and cannot make, that showing about the Persepolis Collection.

Petitioners instead invoke Section 1610(g)(1) of the FSIA. That provision does not abrogate sovereign immunity. It is undisputed that Section 1610(g)(1)

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[6] The court of appeals denied rehearing en banc. Judge Hamilton, who was not on the panel, filed a dissent from the denial. Pet. App. 39-42. He noted that a majority of the active judges on the court were recused; as a result, he said, "it is impossible to hear this case en banc." Id. at 39; see also id. at 35 n.6.

removes the *Bancec* limits that might prevent a party holding a terrorism-based judgment against a foreign state from executing upon assets held by an agency or instrumentality of that state. But Section 1610(g)(1) says nothing about sovereign immunity, and it is implausible to suppose that Congress would have abrogated execution immunity in such a casual fashion in a provision dealing with an entirely different issue.

Beyond that, there is overwhelming evidence in the text of Section 1610(g)(1), and in the relationship between that provision and the rest of the FSIA, that Section 1610(g)(1) does not do what petitioners say. Section 1610(g)(1) specifies that property is subject to attachment and execution "as provided in this section." If petitioners' interpretation were correct, that phrase would be entirely superfluous. In fact, the plain meaning of "as provided in this section" is that property is subject to attachment and execution only as provided in Section 1610—the "section" of which (g)(1) is a subsection. And none of the exceptions to execution immunity in Section 1610 allows petitioners to seize the Persepolis Collection.

The contrast between text of Section 1610(g)(1) and other provisions of Section 1610 further demonstrates that Section 1610(g)(1) does not abrogate sovereign immunity. Section 1609 provides that foreign states' property "shall be immune" from attachment and execution except as provided in Section 1610; each of the provisions of Section 1610 that abrogates immunity then provides, in terms, that certain property "shall not be immune" (or otherwise says that Section 1609 shall not apply). Section 1610(g)(1) contains no such language. In fact, petitioners' interpretation of Section

1610(g)(1) would nullify a deliberate decision that Congress made in the very statute that enacted Section 1610(g)(1): at the same time it enacted Section 1610(g)(1), Congress specified that holders of terrorism-based judgments, like petitioners, are subject to Section 1610(a)(7), with its "commercial activity" limitation, when they seek to execute upon such a judgment.

Petitioners' interpretation of Section 1610(g)(1) also makes most of that provision itself otiose. And their interpretation violates the canon of *expressio unius est exclusio alterius*.

B. Petitioners have no plausible responses to these problems with their interpretation of Section 1610(g)(1). Petitioners (or their supporting amici) suggest that the phrase "as provided in this section" refers to subsection (f)(1) of Section 1610 or to procedural protections in Section 1610. Among other problems with those accounts, the phrase simply does not say either of those things. Petitioners also suggest that the "section" is a section of the Public Law that enacted Section 1610(g)(1), but that statute specifically directed that subsection (g) be added to "Section 1610 of Title 10"—removing any doubt about what "section" Congress had in mind.

Petitioners' response to the point that their reading of Section 1610(g)(1) would make Section 1610(a)(7) superfluous attributes irrational decisions to Congress: if petitioners are correct, Congress amended Section 1610(a)(7) in a way that made it completely pointless at precisely the time that Congress was enacting Section 1610(g)(1). Finally, petitioners say that their view is supported by Congress's decision to include a reference to "the property of a foreign state" in Section

1610(g)(1). But Congress had several reasons to include that language; none has any relationship to sovereign immunity.

C. Petitioners' claim is also inconsistent with fundamental principles of foreign sovereign immunity. Petitioners' interpretation of Section 1610(g)(1) would allow them to seize the noncommercial property of foreign states, like the Persepolis Collection. But especially in connection with execution immunity--the more sensitive aspect of foreign sovereign immunity--the distinction between commercial activity and property, on the one hand, and noncommercial activity and property, on the other, is foundational. That distinction is emphasized in the FSIA itself; in this Court's decisions; in the State Department's statements; in the United Nations convention on the subject; and in a decision of the International Court of Justice. Congress of course has the power to override that distinction, but the Court should not assume that Congress has done so unless there is clear evidence that Congress did. Here the opposite is true: the evidence is overwhelming that Congress intended no such abrogation of sovereign immunity.

ARGUMENT

PETITIONERS MAY NOT EXECUTE THEIR JUDGMENT BY SEIZING THE PERSEPOLIS COLLECTION

A. The Text And Structure Of The Foreign Sovereign Immunities Act Demonstrate That Section 1610(g) Does Not Abrogate The Sovereign Immunity That Attaches To The Persepolis Collection

1. Section 1609 of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609, provides that the property of a foreign state in the United States "shall be immune from attachment arrest and execution" unless that immunity has been abrogated by Section 1610 of the FSIA, 28 U.S.C. § 1610. The Persepolis Collection in the Oriental Institute Museum of the University of Chicago is a collection of ancient Persian artifacts that are the property of a foreign state—Iran—although the Collection has been on loan to the University for many decades. The FSIA therefore bars petitioners from seizing the Persepolis Collection unless they can identify a provision in Section 1610 that abrogates sovereign immunity with respect to the artifacts.

Section 1610(a) of the FSIA describes the kind of foreign state property as to which the immunity from execution has been abrogated.[7] Specifically, Section

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[7] Other subsections of Section 1610 also address the execution immunity of foreign state property, but those provisions do not apply to the Persepolis Collection. See 28 U.S.C. § 1610(b) (dealing with the property of agencies or instrumentalities of foreign states); 28 U.S.C. § 1610(e) (the vessels of foreign states); 28 U.S.C. § 1610(f) (certain assets seized or frozen by the United States government; see pp. 28-29, *infra*).

1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States * * * if" certain other conditions apply. 28 U.S.C. § 1610(a). The subsections of Section 1610(a) then specify the circumstances in which property satisfying that description—"used for a commercial activity in the United States"— may be seized to satisfy a judgment. For example, Subsection (1) of Section 1610(a) provides that such property may be seized if the foreign state has waived its immunity from execution. See 28 U.S.C. § 1610(a)(1). Subsection (2) of Section 1610(a) provides that such property may be seized if "the property is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a)(2).

Petitioners' judgment against Iran is based on Iran's complicity in a terrorist attack. As a result, petitioners have a clearer path to overcoming the execution immunity than other judgment creditors have. Petitioners are entitled to invoke Subsection (7) of Section 1610(a), 28 U.S.C. §1610(a)(7). Congress added Section 1610(a)(7) to expand the remedies available to individuals, like petitioners, who have obtained judgments related to terrorism. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §221(b)(1), 110 Stat. 1214, 1243 (1996).

Subsection (7), read together with the rest of Section 1610(a), provides:

> The property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from

> attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States * * * if * * * the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) * * * regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(7). Sections 1605A and 1605(a)(7), which Section 1610(a)(7) refers to, were also added to the FSIA by Congress in order to enable victims of state-sponsored terrorism to obtain relief from the responsible foreign states. Those provisions abrogated jurisdictional sovereign immunity for certain terrorism-related actions. See Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241 (1996); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338. Section 1605A is the basis of petitioners' judgment. See page 6 note 3, *supra*.

Because their judgment is based on a terrorism-related claim that allows them to invoke Subsection (7), petitioners need not show, for example, that the property they seek to seize was involved in any way with the acts that gave rise to their claim. They also do not have to fit within any of the limits imposed by other subsections of Section 1610(a). They must still show, however, that that property was "used for a commercial activity in the United States."

In the courts below, petitioners contended that the artifacts in the Persepolis collection were, in fact, "used for a commercial activity." Both the district court and the court of appeals rejected that argument. The

petition for a writ of certiorari sought review of that issue, but the Court's order granting certiorari excluded that question. Petitioners may seize property of Iran in the United States that is used for a commercial activity in the United States. But as this case comes to the Court, it is settled that Section 1610(a) does not abrogate the immunity that applies to the Persepolis collection.

2. Petitioners of course recognize, as they must, that they cannot seize the Persepolis collection unless they identify a provision of the FSIA that abrogates the execution immunity that applies to that property. Petitioners assert that Section 1610(g)(1) is such a provision. Their position is implausible for many reasons.

a. To begin with, as the courts below ruled, and as petitioners acknowledge, Section 1610(g)(1) has an obvious purpose that does not involve property like the Persepolis collection in any way. In *Bancec,* this Court determined that "normally" an instrumentality of a foreign state that is established as a "distinct and independent" juridical entity "should be treated as such," although that presumption can be overcome. 462 U.S. at 626-28. As the court below noted, lower courts have identified various factors that would allow the *Bancec* presumption to be overcome. Section 1610(g)(1) lists those factors in subsections (A) through (E) and declares that those factors are irrelevant when a Section 1605A judgment has been entered against a foreign state. For example, under Section 1610(g)(1), the property of "an agency or instrumentality of" that state, whether or not that agency or instrumentality is "a separate juridical entity," is "subject to attachment

in aid of execution, and execution * * * as provided in this section, regardless of" whether the *Bancec* factors are present.

The *Bancec* factors, as we explain below, do not derive from principles of sovereign immunity. Thus the most obvious purpose of Section 1610(g)(1) has nothing to do with sovereign immunity at all. But petitioners contend that Section 1610(g)(1) is a dual-purpose provision. They say that, in addition to straightforwardly overriding the *Bancec* presumption, Section 1610(g)(1) also, *en passant*, abrogates the execution immunity for foreign state property in all terrorism-related cases. In that way, according to petitioners, Section 1610(g)(1) simply renders inoperative the Section 1610(a)(7) limitation—that only property used for a commercial activity in the United States loses execution immunity, even when a terrorism-related judgment is being enforced.

On its face this claim about Section 1610(g)(1) is implausible, even apart from many other problems that petitioners' interpretation encounters. Congress established, in Section 1609, the overarching rule that a foreign state's property is immune from execution in the absence of an exception. According to petitioners, Congress then created such an exception, without saying so explicitly, in a statute whose obvious and primary purpose was something quite different. Execution immunity is, as we have noted, the most sensitive aspect of foreign sovereign immunity. It is implausible to suppose that Congress would abrogate execution immunity in such a backhanded way.

b. That is, however, only the beginning of the problems that petitioners' interpretation of Section

1610(g)(1) faces. Perhaps the most obvious refutation of petitioners' position is in the language of the provision itself: Section 1610(g)(1) specifies that property is subject to attachment and execution "as provided in this section." Petitioners treat that phrase as unwanted surplusage. Petitioners and their supporting amici come up with various explanations of why that phrase is not fatal to their view of Section 1610(g)(1); we will address those explanations below. But petitioners never explain why, if their reading of Section 1610(g)(1) is correct, Congress included that phrase in the statute in the first place. If petitioners are correct, that phrase could be omitted without changing the effect of Section 1610(g)(1) at all. "[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (*Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and citations omitted)).

If the phrase "as provided in this section" is assigned its plain meaning, it becomes clear that petitioners' interpretation of Section 1610(g)(1) is wrong. "[T]his section" is, of course, Section 1610; that is the "section" in which subsection (g)(1) is located. Section 1610 contains the provisions abrogating execution immunity. The most natural reading of Section 1610(g)(1), therefore, is that a party seeking to execute upon the property described in Section 1610(g)(1) must identify some other part of "this section"—Section 1610—that abrogates sovereign immunity and allows that property to be seized. Unless petitioners can show that they are acting "as provided in" Section 1610, they cannot take advantage of Section

1610(g)(1). Petitioners (see, *e.g.*, Pet. Br. i, 25) refer to Section 1610(g) as a "freestanding" abrogation of sovereign immunity. But the phrase "as provided in this section" shows that Section 1610(g)(1) is precisely *not* a "freestanding" provision. It is a provision that specifically links its applicability to other parts of Section 1610. Section 1610(g)(1) makes the property specified in that provision subject to attachment and execution only when other parts of Section 1610 have abrogated sovereign immunity as to that property.

When Congress wishes to make a provision truly "freestanding," it knows how to do so. Indeed it has done so in other statutes having to do with the assets that are available to satisfy terrorism-related judgments. Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), codified as a note following 28 U.S.C. § 1610, makes certain blocked assets—certain assets seized or frozen by the government under the Trading with the Enemy Act, 50 U.S.C. § 4305(b), or the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702—subject to attachment and execution to satisfy a terrorism-based judgment. Section 1610(f)(1) of the FSIA, 28 U.S.C. § 1610(f)(1), although it has never taken effect (see pages 28-29, *infra*), is a similar provision. But both of those provisions, by their terms, apply "[n]otwithstanding any other provision of law." See Pub. L. 107–297, § 201(a); 28 U.S.C §1610(f)(1). That language at least presumptively overrides statutes providing sovereign immunity (see *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016)), making an explicit abrogation of immunity unnecessary. But Section 1610(g)(1) contains no such language. On the contrary: the phrase "as provided in this section" in

Section 1610(g)(1) is the opposite of "notwithstanding any other provision of law." "[A]s provided in this section" explicitly limits the application of Section 1610(g)(1) by requiring that any attachment or execution comply with the other provisions of Section 1610.

c. There is other evidence, in the text and structure of the FSIA, that Section 1610(g)(1) is not an abrogation of sovereign immunity. That becomes clear, for example, if one compares the language of Section 1610(g)(1) with provisions of the FSIA that unquestionably do abrogate sovereign immunity. Section 1609 provides that "the property in the United States of a foreign state *shall be immune* from attachment arrest and execution except as provided in section[] 1610" (28 U.S.C. § 1609; emphasis added). Immunity-abrogating portions of Section 1610 then specify when certain property "shall not be immune." Section 1610(a) provides that foreign state property used for a commercial activity in the United States "shall not be immune" from attachment in aid of execution or execution, if one of the subsections of Section 1610(a) is satisfied. Section 1610(b) provides that property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States "shall not be immune" in certain circumstances. Section 1610(d) specifies when the property of a foreign state, used for a commercial activity in the United States, "shall not be immune" from prejudgment attachment. Section 1610(e) provides that foreign vessels "shall not be immune" from certain forms of attachment and execution.

Section 1610(g)(1) contains no reference to immunity.[8] In contrast to provisions of Section 1610 that abrogate sovereign immunity, Section 1610(g)(1) does not say that certain property "shall not be immune." Nor, of course, does it contain a phrase like "notwithstanding any other provision of law." Instead, Section 1610(g)(1) provides that certain property is "subject to attachment in aid of execution, and execution" and immediately adds "as provided in this section," where the "section" is Section 1610, which elsewhere contains explicit abrogations of immunity. In other words, Section 1610(g)(1) makes property subject to attachment and execution—but only if some other provision in Section 1610 has specified that that property "shall not be immune" or otherwise abrogates sovereign immunity. In petitioners' case, that other provision is Section 1610(a)(7), with its limitation to property used for a commercial activity in the United States.

The reason for Congress's choice of words—and the error of asserting that Section 1610(g)(1) abrogates execution immunity—becomes even clearer in light of what Section 1610(g)(1) undisputedly does. The *Bancec* presumption that Section 1610(g)(1) overrides is not a matter of sovereign immunity. The Court in *Bancec* was explicit on this point: the Court "conclud[ed] that the FSIA does not control the determination" of whether an instrumentality is liable for debts owed by a foreign state. See 462 U.S. at 621. Instead, the Court relied on "principles * * * common to both international law and federal common law" (id. at 623).

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[8] Section 1610(g)(2) refers to the sovereign immunity of the United States, but that provision is irrelevant here.

It follows that when Congress, in Section 1610(g)(1), decided to modify those principles for terrorism-based judgments, Congress did not have to create or expand any exceptions to sovereign immunity—and Section 1610(g)(1) does not do so. That is why Section 1610(g)(1) does not use the language of immunity and instead makes its operation contingent on an abrogation of immunity elsewhere in "this section." Far from being, as petitioners say, a "freestanding execution immunity provision" (e.g., Pet. Br. 48), Section 1610(g)(1) is, as its plain language demonstrates, neither freestanding nor an immunity provision.

d. There is yet another textual barrier to petitioners' interpretation of Section 1610(g)(1). As the court of appeals explained, petitioners' view would render Section 1610(a)(7) superfluous. See Pet. App. 27-28. Petitioners assert that Section 1610(g)(1) abrogates the execution immunity that applies to the property of a foreign state in any case in which a party seeks to execute a judgment based on Section 1605A. If petitioners are correct, then no party with such a judgment would ever resort to Section 1610(a)(7), which contains the commercial activity limitation. Section 1610(b)(3) would, if petitioners are correct, be superfluous for similar reasons.[9]

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[9] Section 1610(b)(3) provides that "[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State * * * if * * * the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of [28 U.S.C. §] 1605A * * * or [28 U.S.C. §] 1605(a)(7)." On petitioners' view, Section

The court of appeals was correct in saying that petitioners' interpretation of Section 1610(g)(1) makes other provisions of the FSIA superfluous, and petitioners' efforts to escape that conclusion are implausible, as we show below. See pp. 32-34, *infra*. But the court of appeals actually understated the problem with petitioners' position. Petitioners would not just create a redundancy in the statute; they would nullify a deliberate decision Congress made to limit an exception to execution immunity.

The history of Section 1610(g)(1) and Section 1605A demonstrates this point. The same statute that enacted Section 1610(g)(1) also enacted Section 1605A. That statute was Section 1083(a) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338. See Pet. Br. App. 36-51. Section 1605A replaced an earlier measure, 28 U.S.C. § 1605(a)(7), that also abrogated jurisdictional immunity for certain claims based on terrorist acts; Section 1605A provided more extensive remedies in such cases than Section 1605(a)(7) had.

The important point is that at the same time that the NDAA added Section 1610(g)(1) and replaced Section 1605(a)(7) with Section 1605A, the NDAA also amended Section 1610(a)(7) specifically to apply to judgments based on Section 1605A. See Pub. L. No. 110-181, §1083(b)(3)(A), 122 Stat. 341; Pet. Br. App. 44. In other words, when Congress enacted Section 1610(g)(1), to allow parties like petitioners with judgments based on Section 1605A to overcome *Bancec*,

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1610(g)(1) abrogates the execution immunity of instrumentalities, so a party holding a Section 1605A judgment would never have to resort to Section 1610(b)(3), with it commercial activity limitation.

Congress also deliberately decided that those parties—parties like petitioners— would be subject to the commercial activity limit of Section 1610(a)(7).

When Congress enacted Section 1605A, it could have provided an unlimited abrogation of execution immunity for judgments based on that provision. But Congress did not do so. Instead, it decided to place Section 1605A judgments into the existing structure of execution immunity by applying the commercial activity limit to those judgments—and it did that at the same time it enacted Section 1610(g)(1). Petitioners would sweep aside this decision by Congress: they would read Section 1610(g)(1) to do, with respect to execution immunity from Section 1605A judgments, the opposite of what Congress did at the very same time that it enacted Section 1610(g)(1). Perhaps from the point of view of a party seeking to execute a Section 1605A judgment, petitioners' interpretation of Section 1610(g)(1) would make Section 1610(a)(7) superfluous, which is problematic enough. But from the point of view of Congress's interest in maintaining an appropriate system of sovereign immunity, what is at stake is something more important: not redundancy but whether Congress's decisions about sovereign immunity will be nullified.

e. There are still other ways in which petitioners' position cannot be reconciled with the text of Section 1610(g)(1). For example, on petitioners' account, nearly all of Section 1610(g)(1) itself is otiose. Section 1610(g)(1) could have ended after the words "subject to attachment in aid of execution, and execution, upon that judgment"—omitting the phrase "as provided in this section," and omitting all of the factors that

Congress used to override the *Bancec* presumption. That truncated version of Section 1610(g)(1) would have supported petitioners' position more strongly than the actual statute does. It is certainly an odd reading of a statute that would ignore the bulk of its operative provisions.

Alternatively, if Congress had wanted to do what petitioners claim, Congress could have added another paragraph to the list of factors that are irrelevant to whether a foreign state's property may be subject to execution. Congress could, for example, have said that a foreign state's property is subject to execution "regardless of * * * whether it is used for commercial activity." But Congress did not add any such provision to the list that followed "regardless of –". Under the maxim *expressio unius est exclusio alterius,* Congress's failure to do so is further evidence, if any is needed, that Section 1610(g)(1) was not intended to override the limits on execution immunity imposed by the rest of the FSIA.

B. Petitioners Give No Plausible Account Of Section 1610(g) That Supports Their Contrary View

Petitioners offer a variety of responses to the textual problems with their position, but none is plausible.

1. In dealing with the phrase "as provided in this section," petitioners, and their supporting amici, seem to suggest three explanations. The first echoes what the Ninth Circuit said in *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), cert. pending, No. 16-334. A Ninth Circuit panel in that case adopted petitioners' view of Section 1610(g)(1). The panel explained away the "as provided for" limitation by saying that it refers "to procedures contained in §1610(f)" (825 F. 3d at 959). Petitioners endorse the Ninth Circuit's explanation. See Pet. Br. 44-45.

There are any number of problems with this explanation. The first, of course, is that the language in Section 1610(g)(1) is "as provided in this section," not "as provided in subsection (f) of this section." The Ninth Circuit's (and petitioners') interpretation is therefore both inconsistent with the language and arbitrary—why subsection (f), as opposed to some other part of Section 1610?

Beyond that, as the Seventh Circuit explained in the opinion below, Subsection (f) "*never became operative*." Pet. App. 33 (emphasis in original). Subsection (f)(1) provides for execution upon certain blocked assets. 28 U.S.C. § 1610(f)(1). When Congress enacted that provision, it authorized the President to "waive [the provision] * * * in the interest of national

security," which President Clinton immediately did.[10] As the Seventh Circuit said "subsection (f), being inoperative from the start, does not allow *any* form of execution," so if the Section 1610(g)(1) phrase "as provided in this section" means "as provided in subsection (f)," then Section 1610(g)(1) "would [allow for] no execution at all" (Pet. App. 34; emphasis in original).

The second explanation, offered by petitioners alone (see Pet. Br. 45-49), is that "this section" refers not to a section of the U.S. Code, but to the Section 1083 of the NDAA—the statute that enacted Section 1610(g)(1) (along with, as we noted, Section 1605A, and various other provisions; see p. 25, *supra*). But the NDAA explicitly provided that "Section 1610 of title 28, United States Code, is amended" by "adding at the end" the provision denominated "(g)." Pub. L. No. 110-181,

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[10] As the Seventh Circuit explained (Pet. App. 33-34):

> Congress originally authorized the President to waive subsection (f)'s provisions "in the interest of national security." [Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277,] § 117(d), 112 Stat. at 2681-[]92. President Clinton immediately issued a blanket waiver. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Congress briefly repealed the President's waiver authority in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1541, 1543, but quickly restored it, *id.* § 2002(f)(1)(B), 114 Stat. at 1543, codifying the Executive's waiver authority in 28 U.S.C. § 1610(f)(3): "The President may waive any provision of paragraph (1) in the interest of national security." President Clinton issued another blanket waiver that same day. Presidential Determination No. 2001- 03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

§ 1083(b)(3), 3(D), 122 Stat. 3, 341 (2008); see Pet. Br. App. 44. When Congress included a reference to "this section" in a provision it was specifically adding to "Section 1610 of title 28, United States Code" Congress—of course—meant "this section" to refer to Section 1610 of title 28.

Petitioners themselves inadvertently provide evidence that Congress did not make the extraordinary blunder of overlooking the fact that it was adding subsection (g) to an existing U.S. Code section. Petitioners cite an earlier, proposed version of the NDAA in which Section 1610(g)(1) contained the phrase "a judgment entered under this section" at the place where the final version says "a judgment entered under Section 1605A." See Pet. Br. 46; Pet. Br. App. 57. As we have said, Section 1605A was enacted as part of the NDAA, along with Section 1610(g)(1). So that reference to Section 1605A in the proposed NDAA did in fact use "this section" to refer to a section of the NDAA. But as petitioners themselves say, Congress spotted the error and changed the language—a clear sign, if any is needed, that the reference to "this section" in the final version of Section 1610(g)(1) did not, contrary to petitioners' quite implausible view, refer to a section of the NDAA.

The third explanation, offered by the amici supporting petitioners, is that the phrase "as provided in this section" just requires conformity with the procedural aspects of Section 1610, not the substantive protections of sovereign immunity. See Former

Officials' Am. Br. 23-25; Foundation Am. Br. 3-4.[11] The problem, again, is that Section 1610(g)(1) does not say that. It does not cross-refer to specific procedural provisions. It does not say "in accordance with the procedures specified in this provision" or anything of that kind. It simply provides that even when attachment and execution are authorized by Section 1610(g)(1), property is subject to attachment and execution only "as provided in this section." The amici suggest no reason to read that phrase more narrowly than it is written.

It is worth remembering, in this connection, that "this section"—Section 1610—is the critical provision of the FSIA, as far as execution immunity is concerned. The FSIA provides that the property of a foreign state "shall be immune from attachment arrest and execution" except as provided in Section 1610. Section 1610(g)(1) deals with making certain property subject to attachment and execution but contains no mention of immunity. When a provision like that refers to "this section," that reference should be taken at face value, not rewritten. The fact that neither petitioners, nor the Ninth Circuit, nor petitioners' supporting amici have been able to come up with a plausible explanation of that phrase that supports petitioners' interpretation of Section 1610(g)(1) is a further demonstration that that interpretation is mistaken.

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[11] "Former Officials' Am. Br." refers to the amicus curiae brief of the Former U.S. Counterterrorism Officials, National Security Officials, and National Security Scholars, in support of petitioners. "Foundation Am. Br." refers to the amicus curiae brief of the Foundation for Defense of Democracies in support of petitioners.

2. Petitioners also attempt to explain why, on their account, Sections 1610(a)(7) and 1610(b)(3) are not superfluous. As we have said, the problem is not just one of superfluity or redundancy but one of removing a sovereign immunity barrier that Congress deliberately left in place. In any event, though, petitioners' arguments do not succeed.

Petitioners' main argument is that Section 1610(a)(7) is not superfluous, on their interpretation of Section 1610(g)(1), because a party holding a judgment under the now-superseded Section 1605(a)(7) would be able to proceed under Section 1610(a)(7) but not under Section 1610(g)(1). But this is not an answer. The objection that a statute makes others superfluous cannot be answered by identifying some class of cases that can be brought under one but not under the other. The problem with an interpretation that renders a provision of a statute superfluous is that it raises the question whether that interpretation attributes an implausible statutory scheme to Congress. The fact that an interpretation causes an overlap among statutes to be only partial, not complete, does not answer the objection that that interpretation causes the statutory scheme to make no sense.

Petitioners' argument in this case is an example. Under Section 1610(a)(7), the holders of judgments under both Section 1605(a)(7) and 1605A may overcome the execution immunity that attaches to the property of a foreign state, as long as that property is used for a commercial activity in the United States. On petitioners' view, Section 1610(a)(7) is of no use to a party with a Section 1605A judgment—that party can proceed under Section 1610(g)(1), free of the

commercial activity limitation. On our view, Section 1610(a)(7) provides the way for both kinds of judgment holders to proceed, because Section 1610(g)(1) addresses a different issue.

Petitioners simply cannot explain why, if they are right, Congress would retain the reference to Section 1605A in Section 1610(a)(7). To say that Section 1610(a)(7) still serves *some* purpose is not an answer. If petitioners' view is correct, Congress's decision to leave the reference to Section 1605A in Section 1610(a)(7)—indeed, as we have said, to place that reference there when Section 1610(g)(1) was created—was simply irrational. On our account, Congress's actions make sense: Section 1610(a)(7) abrogates execution immunity, subject to the commercial activity limitation, for all terrorism-related judgments; Section 1610(g)(1) removes the *Bancec* barrier for those judgments (as long as they are converted to Section 1605A judgments) but says nothing about immunity. The problem with petitioners' view is, again, not just superfluity; it is that petitioners make the statutory scheme irrational.

Actually, petitioners' argument has an even greater problem. As we have noted, Section 1605A and Section 1610(g)(1) were adopted by the same statute, Section 1083(a) of the NDAA. Section 1083(a) added the reference to Section 1605A to Section 1610(a)(7)—something that is utterly inconsistent with petitioners' notion that Section 1610(a)(7) serves no purpose for holders of Section 1605A judgments. But in fact it gets even worse for petitioners. Section 1083(a) *repealed* the reference to Section 1605(a)(7) in Section 1610(a)(7). See Pub. L. No. 110-181, §1083(b)(3)(A), 122 Stat. 341;

Pet. Br. App. 44. After the NDAA was enacted—the statute that created Section 1610(g)(1)—Section 1610(a)(7) referred *only* to Section 1605A. So, according to petitioners' theory, when Congress enacted the NDAA it made a deliberate decision to make Section 1610(a)(7) completely pointless. It is hard to imagine a more convincing refutation of petitioners' theory about the relationship between Section 1610(g)(1) and Section 1610(a)(7)—or, as we have said, stronger support for our view that a party with a Section 1605A judgment who wants to take advantage of Section 1610(g)(1) must also meet the commercial activity requirement of Section 1610(a)(7).

In 2012, Congress, realizing that some holders of Section 1605(a)(7) judgments might not have converted them to Section 1605A judgments, added the reference to Section 1605(a)(7) back into Section 1610(a)(7). See Iran Threat Reduction and Syrian Human Rights Act of 2012, Pub. L. No. 112-158, §502(e), 126 Stat. 1214, 1260. That is what enables petitioners to assert that there is a less-than-complete overlap. But what petitioners cannot do is to ascribe any coherent logic to Congress's decisions. The reason those decisions make sense is that Section 1610(g)(1) does not abrogate sovereign immunity.

3. Finally, petitioners and their supporting amici assert that there are various aspects of Section 1610(g)(1) that are inconsistent with our view. They primarily focus on the reference to "the property of a foreign state against which a judgment is entered under section 1605A." They say (*e.g.*, Pet. Br. 38) that if the purpose of Section 1610(g)(1) was simply to

remove the *Bancec* limit, there would be no reason to refer to the property of the foreign state itself.

Section 1610(g)(1) refers to "the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." The function of Section 1610(g)(1) is to ensure that, when a Section 1605A judgment is entered against a foreign state, all three categories of property are "subject to attachment * * * and execution upon that judgment as provided in this section, regardless of" the *Bancec* factors. In Section 1610(g)(1), Congress made this point in terms: it listed the three categories of property and said that they are all "subject to attachment * * * as provided in this section."

Similarly, in view of the indefinite nature of the *Bancec* inquiry, Congress might have wanted to protect against any possibility that a foreign state's property would be held in a form that would allow a *Bancec*-based claim that the property was too remote from the state to be subject to attachment and execution. Such a claim might be made if, for example, the "property of the foreign state" were "an interest held * * * indirectly in a separate juridical entity" controlled by an unrelated party. The reference to the property of the foreign state in Section 1610(g)(1) forecloses the possibility of any such effort to use *Bancec* as a barrier to seizing assets. Of course, none of this suggests any abrogation of immunity in Section 1610(g)(1); the requirement that property is subject to the attachment

and execution "as provided in this section" applies to all of the categories of property listed in the provision.

The existence of a "foreign state against which a judgment is entered under Section 1605A" is, in any event, the predicate for the entire operation of Section 1610(g)(1). Even the most central *Bancec* issue—whether a judgment against a state makes instrumentalities' property "subject to attachment * * * and execution"—can arise only if there is such a judgment against "a foreign state." So Section 1610(g)(1) had to refer to the foreign state, not just to its instrumentalities. The reference to the state itself, and not just to its instrumentalities, far from being anomalous in the way petitioners suggest, is unavoidable, given the function of Section 1610(g)(1).

Finally, the reference in Section 1610(g)(1) to "the property of a foreign state against which a judgment is entered under section 1605A" may have been intended to broaden, even further, the property that would be "subject to attachment in aid of execution, and execution, upon that judgment as provided in this section." In particular, that reference might make it possible for a party holding a judgment under Section 1605A against one instrumentality of a foreign state to proceed against the property of a different instrumentality of that state, if there is an applicable abrogation of sovereign immunity. That is because Section 1603(a) of the FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state" (28 U.S.C. § 1603(a)). The term "agency or instrumentality of a foreign state" then has its own definition, in Section 1603(b), which is incorporated by reference in Section 1603(a). So it is possible to read

Section 1610(g)(1) to say that "the property of a foreign state against which a judgment is entered under section 1605A" includes the property of any agencies or instrumentalities against which such a judgment has been entered. With the *Bancec* restrictions removed, a judgment against any of those entities might make the property of all of the agencies or instrumentalities of that state, and the property of the state itself, "subject to attachment in aid of execution, and execution, upon that judgment as provided in this section."

It is possible that a different phrasing of Section 1610(g)(1) could also have enabled Congress to accomplish all of these objectives—eliminating the *Bancec* barriers so that all the listed categories of property were subject to attachment and execution; making clear that any interest the foreign state has in property, however remote, is not subject to *Bancec* limitations; identifying a Section 1605A judgment against the state as the predicate for the elimination of those limitations; and, possibly, making the property of all instrumentalities and agencies subject to attachment and execution, "as provided in this section, regardless of" the *Bancec* limits, whenever a terrorism-related judgment was entered against any of them. But it remains the case that, as abundant evidence demonstrates, Section 1610(g)(1) is about *Bancec* and has nothing to do with sovereign immunity.

C. Petitioners' Interpretation Of Section 1610(g) Is Inconsistent With Fundamental Principles Of Foreign Sovereign Immunity

If petitioners' interpretation of Section 1610(g)(1) were accepted, parties with a judgment based on Section 1605A would be able to execute the judgment on property of a foreign state even if that property were not used for a commercial activity in the United States. As we have said, Congress has unquestionably provided a way for parties like petitioners, holding a terrorism-based judgment, to overcome the execution immunity more easily than other judgment creditors can. They can invoke Section 1610(a)(7), which means that they need not show, for example, any relationship between the property they seek to seize and the underlying claim. But they would still have to show that the property was used for a commercial activity in the United States. It is that requirement that petitioners want to use Section 1610(g)(1) to avoid.

The text and structure of the FSIA are an insuperable barrier to petitioners' claim. But petitioners' approach is also at odds with the deeply-rooted principle that a foreign state's execution immunity will be abrogated only in connection with commercial activity or commercial property, not in connection with noncommercial property like the Persepolis Collection. Nothing in the FSIA—and certainly nothing in Section 1610(g)(1)— "suggests Congress intended a radical departure from these principles" in this case (see *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017)).

As we noted, and as the Court has explained, for much of our history United States courts, following the lead of Chief Justice Marshall in *The Schooner Exchange*, afforded an absolute immunity to foreign sovereigns. See *Verlinden*, 461 U.S. at 486. As far as execution immunity was concerned, that absolute barrier apparently persisted up until the enactment of the FSIA. See pp. 4-5 and note 2 *supra*, citing H.R. Rep. 94-1487, 94th Cong., 2nd Sess. 8, 27 (1976). The absolute immunity did give way, by the mid-twentieth century, to the "restrictive" view, which allowed foreign states to be sued and, under more limited conditions, eventually allowed the property of foreign states to be seized in satisfaction of judgments against them.

But the restrictive view drew a clear line between the commercial and the noncommercial affairs of foreign governments. Immunity could be abrogated, but only in "cases arising out of a foreign state's *strictly* commercial acts." *Verlinden*, 461 U.S. at 487 (emphasis added). The distinction between the commercial and noncommercial property of foreign states is, of course, central to the FSIA. The statute itself says that. 28 U.S.C. § 1602. The Court has said so. See, e.g., *Weltover, Inc.*, 504 U.S. at 614. The Tate Letter, on which the FSIA is based, makes that distinction. The logic behind this distinction, as the Court has recently explained, is that nations "acting in a commercial capacity" should be treated "like other commercial entities." See *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320. When a state is not acting in a commercial capacity, the immunity has generally remained intact.

Developments outside the United States reflect the same principle. The United Nations Convention on Jurisdictional Immunities of States and their Properties limits the availability of "post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State" to—among other conditions not relevant here—circumstances in which "it has been established that the property is specifically in use or intended for use by the State for other than government noncommercial purposes" (Art. 19, sec. (c)). In a recent case that, like this one, involved property of cultural significance, the International Court of Justice ruled that "the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy" was "being used for governmental purposes that are entirely noncommercial" and therefore could not be seized to satisfy a judgment. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 ¶ 119.

If petitioners' interpretation of Section 1610(g)(1) were to be accepted, the effect would be that parties with a judgment based on Section 1605A would be able to execute that judgment on property of a foreign state even if that property were not used for a commercial activity in the United States. As we have said, in Section 1610(a)(7), Congress provided an especially broad exception to execution immunity for parties like petitioners. But in providing the Section 1610(a)(7) route for parties holding terrorism-based judgments, Congress left in place the traditional limit on exceptions to immunity, especially execution immunity: the property of the foreign state must be property that is used for a commercial activity.

Congress is, of course, free to depart from these principles. In some instances, in legislating about issues related to terrorism, Congress has arguably done so. But such a departure would mark a sharp change in the law. The Court should not treat Congress as having made such a "radical departure" (*Bolivarian Republic of Venezuela,* 137 S. Ct. at 1320) unless it is clear that Congress did so. In this case, the opposite is true. Far from breaking with these principles, Congress made a specific decision that while parties like petitioners will receive, in many ways, a much clearer path to obtaining foreign states' property to satisfy their judgments, property like the Persepolis Collection will still be protected against execution by the fundamental norms of sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

I. ONLY PETITIONERS' CONSTRUCTION OF THE STATUTE CAN EXPLAIN WHY SUBSECTION 1610(G) SUBJECTS "PROPERTY OF A FOREIGN STATE" TO EXECUTION 1

A. Iran And The Government Cannot Read Subsection 1610(g) Without Deleting The Phrase, "Property Of A Foreign State" 1

B. The University's Attempt To Explain Subsection 1610(g)'s Reference To "Property Of A Foreign State" Backfires 3

II. RESPONDENTS' ASSERTION THAT SUBSECTIONS 1610(A)(7) AND (B)(3) ARE SUPERFLUOUS IS BASED UPON A FUNDAMENTAL MISUNDERSTANDING OF SECTIONS 1605A AND 1610 6

III. THE RESPONDENTS ATTEMPT TO FORCE MEANING INTO THEIR PROPOSED CONSTRUCTION BY MISCONSTRUING THE PHRASE "AS PROVIDED IN THIS SECTION" 12

A. The Respondents And The Government Distort The Meaning Of Subsection 1610(g) By Omitting Terms That Are Central To Its Meaning.. 12

TABLE OF CONTENTS – Continued

Page

B. The Respondents And The Government Cannot Reconcile Their Own Reading Of The Phrase "As Provided In This Section" With Their Construction Of Subsection 1610(g) 16

IV. An Expansive Construction Of Subsection 1610(g) Is Consistent With The Restrictive Theory Of Foreign Sovereign Immunity And Would Not Violate International Law 22

V. Execution Of Terrorism Judgments Against The Persepolis Collection Assets Is Not Foreclosed Under Any Principle Of Foreign Sovereign Immunity Or Other Federal Law 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) 14, 22

Bennett v. Islamic Republic of Iran, 825 F.3d 950 (9th Cir. 2016) ..... *passim*

Bennett v. Islamic Republic of Iran, No. 13-15442 (9th Cir. Oct. 9, 2013) 20

Bennett v. Islamic Republic of Iran, 799 F.3d 1281 (9th Cir. 2015) 20

Corley v. United States, 556 U.S. 303 (2009) 14

Dir., Office of Workers' Comp. Program v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) 21

Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9 (D.D.C. 2011) 8, 14, 22

FAA v. Cooper, 566 U.S. 284 (2012) 20

First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) ..... *passim*

Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014) 19

Leibovitch v. Islamic Republic of Iran, 697 F.3d 561 (7th Cir. 2012) 7, 8, 9

Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) 3

Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017) 9

TABLE OF AUTHORITIES – Continued

Page

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 3

Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013) 20

Stern v. Marshall, 564 U.S. 462 (2011) 10

Tracy v. Iran, 2017 ONCA 549 (Court of Appeal for Ontario 2017) 23

STATUTES

22 U.S.C. § 2459 ..... 24, 25

28 U.S.C. § 1605A ..... *passim*

28 U.S.C. § 1605A(a) 8, 9, 10

28 U.S.C. § 1605A(c) ..... *passim*

28 U.S.C. § 1605(a)(3) 24, 25

28 U.S.C. § 1605(a)(7) 7, 8, 9, 10, 11

28 U.S.C. § 1605(h) 24, 25

28 U.S.C. § 1610 ..... 6, 9, 17, 19

28 U.S.C. § 1610(a) 10, 11, 19, 27

28 U.S.C. § 1610(a)(7) ..... *passim*

28 U.S.C. § 1610(b) 10, 11, 19

28 U.S.C. § 1610(b)(1) 18

28 U.S.C. § 1610(b)(2) 7, 8

28 U.S.C. § 1610(b)(3) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1610(c) 19

28 U.S.C. § 1610(d) 18

28 U.S.C. § 1610(f) 17, 18, 19

28 U.S.C. § 1610(f)(1) 20

28 U.S.C. § 1610(g) ..... *passim*

28 U.S.C. § 1610(g)(1) 15, 21

28 U.S.C. § 1610(g)(1)(A) 5

28 U.S.C. § 1610(g)(1)(C) 5

Canadian State Immunity Act, R.S.C., 1985, c. S-18 (2012) (Canada) 23

Justice for Victims of Terrorism Act, S.C. 2012, c.1, s.2 (2012) (Canada) 23

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3 ..... 7, 8, 9, 11, 21

OTHER AUTHORITIES

151 Cong. Rec. 12869 (June 16, 2005) 16

154 Cong. Rec. S.55 (Jan. 22, 2008) 15

H.R. 1585 Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007) 21

H.R. Rep. No. 110-477 (2007) 16

TABLE OF AUTHORITIES – Continued

Page

Carmen-Cristina Cirlig, European Parliamentary Research Service, *Justice Against Sponsors of Terrorism: JASTA and its International Impact* (Oct. 2016) 22, 23

European Convention on State Immunity 22

REPLY BRIEF FOR PETITIONERS

I. ONLY PETITIONERS' CONSTRUCTION OF THE STATUTE CAN EXPLAIN WHY SUBSECTION 1610(G) SUBJECTS "PROPERTY OF A FOREIGN STATE" TO EXECUTION

A. Iran And The Government Cannot Read Subsection 1610(g) Without Deleting The Phrase, "Property Of A Foreign State."

Subsection 1610(g) enables enforcement of judgments against ***both*** the property of a state sponsor of terrorism ***and*** the property of the state's agencies and instrumentalities. 28 U.S.C. § 1610(g). In the latter case, § 1610(g) partially abrogates *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*") by enabling certain terrorism judgment creditors of the state to pierce the corporate veil and enforce their judgments against the assets of the state's juridically independent agencies and instrumentalities. But veil-piercing has no application to enforcement against the property of the state defendant itself. Had Congress enacted subsection 1610(g) with the sole purpose of abrogating *Bancec*, it would not have subjected the state's ***own*** property to execution.

Neither Iran nor the government can account for the inclusion of "property of a state" in subsection 1610(g). Instead, they argue that because a terrorism ***judgment*** under 28 U.S.C. § 1605A entered against the state is critical to execution upon the property of state-owned agencies, subsection 1610(g) had to

mention the sovereign judgment debtor itself. However, this evasion addresses the statute's reference to the judgment against the state; it does not, and cannot, account for subsection 1610(g)'s provision that "the ***property*** of a foreign state" (emphasis added), is subject to execution upon a section 1605A judgment.

If subsection 1610(g) merely abrogated *Bancec* it would have provided: "Subject to paragraph 3, the property of an agency or instrumentality of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment. . . . " According to respondents' construction, and that of the courts below, the statute's provision for execution upon "the property of a foreign state" is not only superfluous, but inapposite. Without an explanation for the inclusion of this phrase in the statute, Iran and the government simply read it out of the statute.

In subsection 1610(g), Congress clearly intended to permit execution of judgments against property of the state itself. And had Congress not intended to use subsection 1610(g) to expand the type of property subject to execution, it would have simply omitted from subsection 1610(g) any reference to the property of the state, and relied upon the existing execution immunity provisions, such as subsection 1610(a)(7). By including property of the state in subsection 1610(g), by not qualifying subsection 1610(g) with any commercial use restrictions, and by providing that property of the state is subject to execution upon a section 1605A judgment regardless of factors relating to the control, management, benefit, and use of the property, Congress

manifested its intent to enable section 1605A judgment holders to execute their judgments upon nearly all Iranian property.

B. The University's Attempt To Explain Subsection 1610(g)'s Reference To "Property Of A Foreign State" Backfires.

Unlike Iran and the government, the University of Chicago attempts to account for the inclusion of "the property of a foreign state." U.C.Br.35. The University speculates that Congress "might have" included that phrase in subsection 1610(g) to enable creditors to reach property belonging to the foreign state that is an interest held indirectly in a separate juridical entity controlled by a third party. The University's suggestion that the phrase "the property of a state" was intended to enable execution upon state-owned property controlled by a third party is a welcome concession. And it highlights the internal contradictions within the respondents' construction of subsection 1610(g).

Contrary to the implication of the respondents' arguments, the decisions below were ***not*** based upon a finding that the artifacts were not used for an activity of a commercial nature. Pet.App.16, 57 n.10. In fact, the nature of the use of the artifacts was "commercial" as that term of art is defined under the FSIA. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) (lending art not a sovereign act, even if owned by a sovereign). Rather, the courts below held

that the "commercial use" referred to in subsection 1610(a) had to be use ***by the foreign state itself***.[1] Use by the University – a third-party – would not suffice. Pet.App.3, 57. And because the courts held that 1610(g) could only enable execution upon satisfaction of all the stringencies of subsections 1610(a)(7) and (b)(3), including, under subsection 1610(a)(7), that the foreign state ***itself*** use the property, the lower courts held that subsection 1610(g) did not apply.

But if the University is correct that the phrase, "the property of a foreign state" is intended to ensure judgment creditors can reach state-owned property that is controlled by an unrelated third party, then subsection 1610(g) would enable the petitioners to execute their judgment against the artifacts, which are directly owned by Iran but controlled by a third-party – the University. Thus, if the University is right, the Court should reverse the decision below and remand with instructions to make findings of fact as to whether the University's use of the property is "commercial" as that term is understood under the FSIA, or alternatively, whether subsection 1610(g)'s other provisions similarly override subsection 1610(a)'s requirements.

At a minimum, the University's hypothetical, which purports to explain the inclusion of "the property of a foreign state," demonstrates the impossibility of reconciling the stringencies of subsection 1610(a) with subsection 1610(g)'s provisions that property of a

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[1] Petitioners sought certiorari review of this holding, but this Court did not grant cert on that question.

foreign state is subject to execution regardless of whether the state manages or controls the property, or with the provision allowing execution upon property that is indirectly held in a separate juridical entity. *See* 28 U.S.C. § 1610(g)(1)(A), (C). In none of these instances is the foreign state itself using the property.

In short, if subsection 1610(a)(7)'s requirement that the use be made by the state itself trumps subsection 1610(g)'s leniencies, then many provisions of subsection (g) are meaningless, and the decision below should be reversed to avoid that result. And if subsection 1610(g) trumps subsection (a)'s strict requirements, then the very basis of the lower courts' holdings is negated, and the case should be reversed on that ground. The *Bennett* court noted these contradictions, and refused to resolve this "tension" by "read[ing] into § 1610(g) . . . limitation[s] that Congress did not insert." *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960 (9th Cir. 2016). Instead, *Bennett* construed "property of a foreign state" to mean ***any*** property of a foreign state. And to avoid conflicting terms, *Bennett* held that execution of judgments under subsection 1610(g) was not dependent upon satisfaction of restrictions Congress did not include in that provision. *Id.*

The University next speculates that the phrase "the property of a foreign state" enables a judgment entered against one foreign state-owned agency to be enforced against the property of a different state-owned agency. U.C.Br.36. This "lateral enforcement" theory finds no support in the text of the statute. Subsection 1610(g)'s abrogation of *Bancec* does not completely

eviscerate the corporate form of state-owned agencies. It merely allows a judgment against the state to be enforced against the property of its agencies or instrumentalities. It does not allow a judgment against an agency or instrumentality to be enforced against the state, much less against a different agency or instrumentality. Veil piercing under subsection 1610(g) is a one-way street.

II. Respondents' Assertion That Subsections 1610(a)(7) And (b)(3) Are Superfluous Is Based Upon A Fundamental Misunderstanding Of Sections 1605A And 1610.

Unable to account for subsection 1610(g)'s allowing execution of "the property of a foreign state," respondents shift their focus and argue that if subsection 1610(g) enables execution of 1605A judgments against almost all property of the foreign state, then subsections 1610(a)(7) and 1610(b)(3), which are more limited enforcement provisions for terrorism cases, are rendered superfluous. Iran.Br.18; U.S.Br.25; U.C.Br.32-34. The respondents misconstrue and misunderstand the roles of each of these provisions. As the respondents themselves note, in 2012, Congress amended subsections 1610(a)(7) and (b)(3) to reinsert references to the former terrorism exception to jurisdictional immunity. However, Congress did not amend subsection 1610(g), which remained applicable only to judgments entered under the new section 1605A. The unavoidable implication of this disparity is that Congress intended the

different execution immunity exceptions to apply to enforcement of different types of judgments.

Prior to the enactment of section 1083 of the National Defense Authorization Act of 2008, the FSIA included a terrorism exception to jurisdictional immunity. *See* 28 U.S.C. § 1605(a)(7) (2007). Like the other jurisdictional immunity exceptions, the former terrorism exception did not include a private right of action. *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 564 (7th Cir. 2012). While the immunity exception opened the courthouse door to terrorism victims, Plaintiffs were required to identify a cause of action elsewhere, usually under state or foreign law. *Id.*

The pre-2008 FSIA also provided execution immunity exceptions for those plaintiffs who obtained terrorism judgments under their state or foreign law claims. These execution immunity exceptions were codified in former subsections 1610(a)(7) and (b)(2).[2] These subsections provided, respectively, that the property of a foreign state and the property of an agency or instrumentality of a foreign state were not immune from execution if, "the judgment relates to a claim for which" the foreign state or agency or instrumentality "is not immune" under the then-applicable terrorism jurisdictional immunity exception, subsection 1605(a)(7). Subsections 1610(a)(7) and (b)(2) both enabled enforcement of judgments on any ***claims for***

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[2] Subsection 1610(b)(2)'s terrorism exception was later renumbered 1610(b)(3).

which the foreign state, or its agency, or instrumentality ***were not immune***.

The jurisdictional immunity exception codified at 1605(a)(7) covered a large class of potential plaintiffs. It applied to plaintiffs in situations where ***either*** the victim or the claimant satisfied certain requirements, such as being United States nationals. *Leibovitch*, 697 F.3d at 564. This provision created an exception to jurisdictional immunity that enabled both United States nationals and their non-United States national relatives to sue foreign state sponsors of terrorism. *See id.* And if either type of plaintiff obtained a judgment, they could enforce it under subsection 1610(a)(7) or (b)(2).

In section 1083 of the NDAA of 2008, Congress overhauled the terrorism exceptions to foreign sovereign immunity with the express purpose of, among other things, creating new powerful remedies for victims of terrorism and significantly expanding the scope of foreign state property subject to execution of judgments. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 26 (D.D.C. 2011). Congress moved the former terrorism jurisdictional immunity exception from subsection 1605(a)(7) to new subsection 1605A(a). At the same time, Congress also created a new private right of action that included powerful new remedies. 28 U.S.C. § 1605A(c). While expanding the available remedies for terrorism victims, Congress restricted the private right of action in subsection 1605A(c) to a narrower class of plaintiffs than the jurisdictional immunity exception in subsection

1605A(a) (formerly subsection 1605(a)(7)). *Leibovitch*, 697 F.3d at 564; *Owens v. Republic of Sudan*, 864 F.3d 751, 806 (D.C. Cir. 2017). Specifically, the jurisdictional immunity exception continues to apply when either the claimant or the victim is a member of one of the defined groups of plaintiffs. In contrast, the private right of action is available only to plaintiffs who are themselves United States nationals, members of the armed forces, government employees or contractors, and legal representatives of one of the identified potential plaintiffs. 28 U.S.C. § 1605A(c). *Leibovitch*, 697 F.3d at 564; *Owens*, 864 F.3d at 806. The jurisdictional immunity exception accommodates claims brought under the new private right of action, and it continues to allow claims under other sources of law, such as state or foreign causes of action for plaintiffs who are not eligible to assert the private right of action.

Finally, in section 1083 of the NDAA of 2008, Congress amended subsections 1610(a)(7) and (b)(3) to enable enforcement of ***judgments*** entered on ***claims*** brought under subsection 1605A(a). The amendments to subsections 1610(a)(7) and (b)(3) were needed to provide an enforcement mechanism for those plaintiffs who were able to bring state or foreign law claims under the jurisdictional immunity exception but could not avail themselves of the private right of action in subsection 1605A(c).

NDAA section 1083 also added subsection 1610(g), which applies only to "judgments entered under section 1605A." 28 U.S.C. § 1610(g). The language of section 1610 compels the conclusion that subsection

1610(g) allows only enforcement of terrorism judgments by creditors who are among the narrower class of plaintiffs to whom the private right of action of 1605A(c) is available. Subsection 1610(a)(7) applies where the "judgment relates to ***a claim for which the foreign state is not immune*** under section 1605A or section 1605(a)(7)." Subsection (b)(3) uses the same language with respect to judgments against agencies or instrumentalities. Thus, by their express terms these subsections apply to ***any*** claims for which the foreign state ***is not immune*** – even claims brought under state or foreign law. In contrast, subsection 1610(g) is worded very differently, and provides for enforcement only of "judgments entered under section 1605A." Judgments are entered under claims. They are not entered under sovereign immunity exceptions. The only claim under section 1605A is the private right of action found in 1605A(c).

Additionally, subsection 1610(g) is limited to judgments "entered under section 1605A," whereas subsections 1610(a)(7) and 1610(b)(3) allow recovery for a broader group of plaintiffs whose judgments "relate[] to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)." 28 U.S.C. § 1610(a)(7); *see also* 28 U.S.C. § 1610(b)(3) (same). The broader language of 1610(a) and (b) allows attachment whenever the plaintiffs rely on the immunity waiver in 1605A(a) regardless of whether the plaintiff employs the cause of action in 1605A(c). *See Stern v. Marshall*, 564 U.S. 462, 473-74 (2011) (in the bankruptcy context, distinguishing between the narrower category of

claims "*arising under* title 11" and the broader categories of claims "*related to* a case under title 11") (emphases added).

In addition to providing relief to the judgment creditors who can benefit from the immunity exception but not from subsection 1605A(c)'s private right of action, subsections 1610(a)(7) and (b)(3) were intended to enable other judgment creditors holding judgments that could not benefit from subsection 1610(g), such as those who held judgments under former subsection 1605(a)(7) that would not be converted to section 1605A judgments. Respondents claim this cannot be because, as originally amended, subsections 1610(a) and (b) referred only to claims that were not immune under section 1605A and omitted any reference to the former terrorism exception – 28 U.S.C. § 1605(a)(7). Iran.Br.39. But the respondents' construction of the 2008 amendments requires a holding that Congress intended to extinguish the enforcement rights of these holders of older judgments. This suggestion is preposterous given that Congress's express purpose in enacting section 1083 was to expand the remedies and enforcement options of terrorism victims. Congress's intent in the original amendments is also evident from its further amending these provisions in 2012 to reinsert references to the former jurisdictional immunity exception, which demonstrates that (a) Congress intended subsections 1610(a)(7) and (b)(3) to enable execution upon different judgments than those subject to execution under subsection 1610(g); and (b) Congress did not intend to extinguish

the enforcement rights of those holding judgments under claims brought pursuant to the former subsection 1605(a)(7) immunity exception.

III. The Respondents Attempt To Force Meaning Into Their Proposed Construction By Misconstruing The Phrase "As Provided In This Section."

A. The Respondents And The Government Distort The Meaning Of Subsection 1610(g) By Omitting Terms That Are Central To Its Meaning.

Subsection 1610(g) is an extremely powerful judgment enforcement provision, stripping all but a skeletal frame of execution immunity. To compensate, Congress deliberately limited the breadth of subsection 1610(g)'s application by restricting both the class of states to which it could apply and the class of plaintiffs who could invoke it. Congress effected both of these restrictions by conforming subsection 1610(g) to the private right of action of subsection 1605A(c). Depending upon a judgment entered under section 1605A's private right of action, subsection 1610(g) applies only to designated state sponsors of terrorism. For the same reason, the class of plaintiffs who may invoke this provision is limited to United States nationals, members of the armed services, government employees and contractors, and their legal representatives. 28 U.S.C. § 1605A(c). Thus, the centrality to subsection 1610(g) of the subsection 1605A(c) judgment cannot be overstated.

The respondents and the government assert that the meaning of subsection 1610(g) can be reduced to six words, separated by strategically-placed ellipses. They claim that the scope of 1610(g) is constrained by the words, "execution . . . as provided in this section," which limit execution to property otherwise available under the narrow terms of 1610(a)(7). U.C.Br.20; Iran.Br.22-24; U.S.Br.16. However, the respondents cannot read the statute in this way without removing the words, "under that judgment" – the 1605A judgment – from the center of that clause. This omission distorts the meaning of subsection 1610(g).

The phrase "as provided in this section" modifies the 1605A judgment, the last antecedent before that phrase. Additionally, the punctuation demonstrates that "as provided in this section" refers to the 1605A judgment, and not, as the respondents claim, "execution," which is separated with a comma from the phrase, "upon that judgment as provided in this section." The respondents invite the Court to elide the words "upon that judgment." Such a reading distorts the textual meaning of subsection 1610(g), which is explicitly tied to the 1605A judgment, and it distorts the meaning of the phrase, "upon that judgment as provided in this section," which emphasizes the centrality of the 1605A judgment.

The government asserts, "subsection (g) consists of one sentence with one subject." Gov.Br.13. But to restrict the "one sentence" to the narrow "one subject" of their own choosing, the government and respondents are forced to cut from the statutory text both the

reference to the foreign state's own property and the reference to the section 1605A judgment, both of which lie at the heart of subsection 1610(g). Thus, the government and the respondents do not construe subsection 1610(g) as "one sentence," but as one phrase interrupted by ellipses – "execution . . . as provided in this section." However, "[o]ne of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). The respondents and the government would have the Court violate this fundamental canon by deleting two of the central phrases of subsection 1610(g) – the reference to "the property of a foreign state" and "upon that judgment."

Additionally, there is no canon of statutory construction that a statute can give effect to only a single legislative purpose. But if subsection 1610(g) has only a single purpose, that purpose is "to make available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, ***or*** its agency or instrumentality, to satisfy a judgment against that state." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016) (emphasis added); *see also Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960-62 (9th Cir. 2016); Pet. App. 41 (Hamilton, J., dissenting); *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 26 (D.D.C. 2011) ("a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related

judgments under the FSIA.") (emphasis added). The government substitutes its own narrow purpose as the "one subject" of subsection 1610(g). Then, to read the "one sentence" of subsection 1610(g)(1) to comport with the one subject, the government is forced to delete at least nine words from two different clauses of that one sentence (which contains 158 words).

Similarly, the respondents quote selectively from the legislative history under the same misapprehension – that legislation may give effect to only one purpose, and that Congress would not enact a law having broader effect than the narrowest possible construction that might give effect to that one purpose. *See* Iran.Br.29-30. While, as Iran observes, Senator Lautenberg said that the *Bancec* barrier was a motive for the legislation, he did not say that *Bancec* limits subsection 1610(g). On the contrary, Senator Lautenberg said that subsection 1610(g) would remedy the problem faced by plaintiffs who could not show that Iran exercised day-to-day managerial control over an asset owned by Iran through an Iranian bank. He said that subsection 1610(g) would remedy this obstacle "by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." 154 Cong. Rec. S.55 (Jan. 22, 2008). Senator Lautenberg did not say that the legislation remedied the obstacle by allowing plaintiffs to pierce the corporate veil, which of course, it does. Rather, he said the legislation would enable attachment of an asset "upon the satisfaction of a 'simple ownership' test." *Id.* To ensure the legislation would, in fact, remedy the

Bancec obstacle, subsection 1610(g) was crafted to "eliminat[e] ***many of the barriers***" that prevented U.S. Citizens from enforcing their terrorism judgments. 151 Cong. Rec. 12869 (June 16, 2005) (emphasis supplied). Accordingly, Congress cast a wide net that was designed to go beyond mere veil piercing, and enable execution upon "any property in which the foreign state has a beneficial ownership." H.R. Rep. No. 110-477, 1001 (2007) (Conf. Rep.). On the same page that the Conference Report says that subsection 1610(g) is intended to reach ***any*** beneficial ownership interest, the Report clarifies that this does not include diplomatic property. *See id.* That the authors of the Report felt compelled to clarify that diplomatic property would not be subject to execution, indicates that subsection 1610(g) is not otherwise limited.

B. The Respondents And The Government Cannot Reconcile Their Own Reading Of The Phrase "As Provided In This Section" With Their Construction Of Subsection 1610(g).

Even after reducing the meaning of subsection 1610(g) to the single phrase "execution . . . as provided in this section," the respondents and the government cannot reconcile that phrase with a construction of subsection 1610(g) that would favor them. The respondents and the government object to the *Bennett* court's construction of subsection 1610(g) because it understood "as provided in this section" to refer to the other terrorism execution immunity exception,

subsection 1610(f). The respondents assert that subsection 1610(f) is a subsection, not a "section," and Congress would not have cross-referenced subsection (f) in this way. But the respondents and the government cannot even agree among themselves what the phrase "as provided in this section" means or how it operates; each claims that "as provided in this section" refers to different ***subsections*** within section 1610. However, almost none of the suggested cross-referenced subsections could possibly work together with the respondents' reading of subsection 1610(g).

The government concedes that when subsection 1610(g) allows "execution . . . as provided in this section" it does not really mean ***section*** 1610. Rather, the government claims that phrase refers only to ***subsections*** 1610(a)(7) and (b)(3). U.S.Br.15. The University does not even try to construe the clause as referring to section 1610 as a whole; it merely asserts that in this case, "as provided in this section" refers to ***paragraph (7) of subsection 1610(a)***. U.C.Br.23.

Iran, meanwhile, continues to maintain, that subsection 1610(g) cannot permit execution through subsection 1610(b)(3). Iran.Br.42-43. As it argued in *Bennett*, Iran continues to maintain that subsection (b)(3) is available only where a judgment is entered against the agency or instrumentality whose assets are to be seized. Iran's construction undermines the validity of the decision below. According to Iran, the court of appeals erred when it held that subsection 1610(g) can permit plaintiffs to pierce the corporate veil of foreign state agencies or instrumentalities

under subsection (b)(3). Veil piercing is only relevant where a judgment is entered against the state and the plaintiff seeks to enforce the judgment against the assets of the state's agency or instrumentality.

Without subsection (b)(3), under Iran's construction of subsection 1610(g)'s phrase, "as provided in this section" really means "as provided in *subsection* 1610(a)(7)." And the same objection to the *Bennett* holding which read that phrase to refer to *subsection* (f) would defeat the decision of the court below. Both constructions would limit "this section" to a single subsection.

Iran's attempt to avoid this result is utterly implausible. Iran argues that its agencies or instrumentalities ***could*** waive their foreign sovereign immunity, in which case, subsection 1610(b)(1) could theoretically work together with subsection 1610(g). Iran.Br.43. Similarly, Iran suggests that subsection 1610(d), which permits prejudgment attachment under very narrow circumstances, could also theoretically fit, assuming Iran would expressly waive its immunity. Iran.Br.43. Iran's suggestion that the four remaining designated state sponsors of terrorism would waive their immunity to allow enforcement of judgments by terrorism victims is not credible for at least two reasons: (a) if Iran were inclined to waive its immunity, we would not be here litigating this case because it would have paid the judgments or at least renounced its support of terrorism; and (b) the United States government rejects that possibility.

Iran also asserts that subsection (c) could work in tandem with subsection (g). Iran.Br.42-43. Subsection (c) requires judgment creditors to wait a "reasonable" amount of time and to provide notice of the judgment to the state debtor before initiating enforcement proceedings. It also requires a separate order permitting enforcement. By its terms, subsection (c) applies only to "attachment or execution referred to in subsections (a) and (b)." It does not mention attachment or execution referred to in subsection (g). Based upon this language, *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576-77 (7th Cir. 2014), held that subsection 1610(c)'s "solicitous notice requirements" are not applicable to judgments enforced under subsection 1610(g).

Again parting ways with the government and the court below, Iran argues that the phrase "as provided in this section" could refer to other paragraphs within subsection 1610(a). Iran.Br.43. But Iran concedes that reference to these other paragraphs would be superfluous because they would be "subsumed within subsection (a)(7). Finally, Iran claims that subsection 1610(g) could work together with subsection 1610(f). But elsewhere in its brief Iran claims that this is impossible. Iran.Br.34-35.

If the Court were to adopt the respondents' reading of 1610(g) and the phrase "as provided in this section," the only provision of section 1610 that could possibly pair with subsection 1610(g) is subsection 1610(a). But even subsection 1610(a)(7) does not work because it contradicts several provisions of subsection 1610(g), as discussed above.

The respondents argue that subsection 1610(g) cannot provide an execution immunity exception because it does not use the words "shall not be immune." But subsection 1610(g)'s language matches the language of subsection 1610(f)(1), an undeniable immunity waiver that, like subsection 1610(g), uses the language "subject to" execution rather than "shall be immune." The Court has "never required that Congress use magic words." *FAA v. Cooper*, 566 U.S. 284, 291 (2012); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (same).

Additionally, to ensure that subsection 1610(g) would be construed to both abrogate *Bancec* and allow execution regardless of whether the property satisfies the strict requirements of subsection 1610(a), Congress could not use the "shall not be immune" language. That wording would suggest the removal of an immunity barrier; it would not necessarily signal affirmatively that the execution should proceed. Indeed, even as subsection 1610(g) is written, Iran presented such an argument in *Bennett*. In the court of appeals, Iran denied that subsection 1610(g) abrogated *Bancec*, asserting that even if the 1610(g) *Bancec*-factors are considered, "nothing in 1610(g) prohibits courts from upholding an instrumentality's independent status on ***other*** grounds." *See* Iran.Br.44-45, *Bennett v. Islamic Republic of Iran*, No. 13-15442 (9th Cir. Oct. 9, 2013) (emphasis in original). The court of appeals correctly rejected Iran's argument. *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1286-87 (9th Cir. 2015). But had 1610(g) used the language "shall not be immune,"

Iran's argument would have had more force. By stating that property of the state and property of the instrumentalities is subject to execution, Congress made clear that it was not merely removing a single barrier to execution, but affirmatively providing that execution should proceed.

Respondents argue that Congress drafted section 1083 *as an insert* to the previously enacted section of the U.S. Code, and that "section" therefore refers to a section of the U.S. code, not the public law. U.S.Br.19-20; Iran.Br.35. But early drafts of section 1083 used the parallel terms "a judgment entered under this section" at the beginning of subsection 1610(g)(1) and "execution upon that judgment as provided in this section" at the close of subsection 1610(g)(1). *See* H.R. 1585 Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007). As respondents observed, the first reference was changed to "a judgment entered under section 1605A." The second reference, almost surely through a scrivener's error, was left unchanged. "Correcting a scrivener's error is within this Court's competence." *Dir., Office of Workers' Comp. Program v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 142 (1995) (Ginsburg, J., concurring). Reading "this section" to refer to a "judgment as provided in section 1605A" restores the parallel construction and advances a rational congressional policy linking liability and recovery for American plaintiffs suing state sponsors of terror.

IV. An Expansive Construction Of Subsection 1610(g) Is Consistent With The Restrictive Theory Of Foreign Sovereign Immunity And Would Not Violate International Law.

The respondents assert that giving effect to subsection 1610(g) as written would violate international law and basic principles of foreign sovereign immunity. Iran.Br.49; U.C.Br.38. As discussed in the petitioners' Brief (Pet.Br.53-54), Congress deliberately left intact the immunity of core sovereign-use property, such as diplomatic, military, and certain central bank assets. *See, e.g.*, *Bank Markazi*, 136 S. Ct. at 1318 n.2 (central bank assets remain immune); *Heiser*, 807 F. Supp. 2d at 19 n.7 (diplomatic assets remain immune). By protecting these types of sovereign property, subsection 1610(g) manifests the restrictive theory of foreign sovereign immunity, appropriately calibrated to address the unique circumstances presented by designated state sponsors of terrorism. Pet.Br.53.

Moreover, international law is unsettled regarding applications of the restrictive theory. The only international agreement on foreign sovereign immunity in force is the European Convention on State Immunity. *See* Carmen-Cristina Cirlig, European Parliamentary Research Service, *Justice Against Sponsors of Terrorism: JASTA and its International Impact* at 3 (Oct. 2016). That agreement has been ratified by only eight states. *Id.* Likewise, states differ in their application of the distinction between sovereign and private acts, acceptance of a tort exception, and recognition of an immunity exception for *jus cogens* violations, including

human rights violations, international crimes, and terrorism. *Id.*

Canada, for example, has enacted the Justice for Victims of Terrorism Act (the "JVTA"), S.C. 2012, c. 1, s.2 (2012), which, among other things, provides a private right of action for victims of terrorism that allows them to sue for any loss or damage from "a foreign state whose immunity is lifted under section 6.1 of the State Immunity Act." *Id.* s.4(1). The Canadian State Immunity Act enables victims to enforce their terrorism judgments against the property (including non-commercial property) of the identified state supporters of terrorism. R.S.C., 1985, c. S-18. The JVTA also provides for recognition and enforcement of foreign terrorism judgments. *Id.* s.4(5).

The Canadian execution immunity exception reaches beyond even the most expansive reading of subsection 1610(g). For example, in *Tracy v. Iran*, 2017 ONCA 549 (Court of Appeal for Ontario 2017), the court permitted victims holding section 1605A judgments against Iran to enforce their American judgments against Iranian property in Canada, including assets alleged to have been diplomatic property. Nonetheless, the court approved a pre-judgment attachment order, the recognition and enforcement of the American judgments, the removal of Iranian foreign sovereign immunity, the execution of the judgments against Iranian assets located in Canada, and the entry of an order awarding costs to the judgment creditors. The Canadian court also upheld these orders

notwithstanding Iran's assertion that the enforcement of the judgments was in violation of international law.

V. Execution Of Terrorism Judgments Against The Persepolis Collection Assets Is Not Foreclosed Under Any Principle Of Foreign Sovereign Immunity Or Other Federal Law.

The respondents attempt to manipulate the Court's construction of subsection 1610(g) with the lament that if petitioners prevail Iran will be denied its "patrimony." But Congress has twice enacted provisions governing the scope of immunity afforded to culturally significant objects. Neither protects the artifacts here. ***First***, the Immunity From Seizures Act, 22 U.S.C. § 2459, enables lenders of culturally significant objects to American institutions to seek and obtain legal immunity for those objects under circumstances not relevant in this case. ***Second***, just last year, Congress amended the FSIA to provide that where section 2459 is satisfied, the temporary display of cultural objects loaned by foreign states "shall not be considered to be commercial activity by such foreign state for purposes of subsection [1605](a)(3)." 28 U.S.C. § 1605(h) (2016).

These statutes reflect Congress's considered decision that (a) cultural objects are not presumed to enjoy immunity regardless of whether they are a foreign state's "patrimony"; (b) cultural objects may be granted immunity under specified conditions and only upon prior request; (c) the display of cultural objects by

American cultural or educational institutions ***is*** "commercial activity" in the absence of subsection 1605(h)'s fictitious declassification; and (d) subsection 1605(h)'s limited protection applies only to the expropriation immunity exception of subsection 1605(a)(3), and even then, it does not apply to Nazi-era or similar expropriations that target vulnerable groups.

Congress clearly delineated the bounds of immunity for cultural objects, and that immunity does not apply here. Additionally, the terms of subsection 1605(h) belie the respondents' assertions that the property at issue here was not used for commercial activity. Thus, construing subsection 1610(g) to allow execution upon the artifacts would merely apply enforcement rights enabling execution of the section 1605A judgment against Iran's property that was used by a third party for commercial activity. Regardless of how the Court construes subsection 1610(g), the immunity Congress has extended to culturally significant objects will remain unaffected. Additionally, virtually all cultural loans are, and will remain, eligible for immunity under section 2459.

Iran has both claimed responsibility for, and attempted to justify, its role in this attack and countless others. Now, demonstrating that its barbarism is matched by its *chutzpah*, Iran asks the Court to save its "patrimony" from its victims. Through its acts of terrorism and refusal to pay a valid judgment, Iran has placed its artifacts at risk. Iran ***can*** pay the judgment and redeem the artifacts; until now, it has simply refused to do so. But, if the petitioners prevail, the

likelihood that Iran would redeem its artifacts by simply paying the judgment is high. And, the prospect that Iran will elect to allow its artifacts to be sold by a court-appointed receiver (as petitioners requested below) should be of no concern to the Court. Rather, the Court must decide whether Congress intended to let Iran off the hook or to hold its feet to the fire. As the dissent below cautioned: "We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the Rubin panel." Pet.App.42.

CONCLUSION

The Court should reverse the Seventh Circuit's holding as to subsection 1610(g) with instructions to enter judgment in favor of the petitioners and appoint a receiver to identify an appropriate purchaser who will ensure the artifacts are treated appropriately, or in the alternative, based upon the University's argument, reverse the decision below and remand with instructions to make findings of fact as to whether the University's use of the property is "commercial" and

whether subsection 1610(g)'s provisions override or limit other requirements of subsection 1610(a).

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RECORD AND BRIEFS

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In The

Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

A. The Seventh Circuit's decision conflicts with holdings of this Court and of the lower courts of appeals 2

B. Other provisions of the FSIA demonstrate that the execution immunity exception of section 1610(a) applies where foreign state property is used by third parties 5

C. This Court's precedents hold that foreign state-owned property is subject to execution when it is used by third parties 7

D. The University's use of the assets constitutes use of a commercial nature under the FSIA and any uncertainty as to this question does not preclude review 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 2, 7, 8, 9

Bates v. United States, 522 U.S. 23 (1997) 2

Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010), *cert. den.*, 564 U.S. 1067 (2011) 4

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016) 10

Dean v. United States, 556 U.S. 568 (2009) 2, 3, 4, 5

Harrison v. Republic of Sudan, 838 F.3d 86 (2d Cir. 2016) 4

Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) 10

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 9, 10

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 2, 7, 8

Samantar v. Yousuf, 560 U.S. 305 (2010) 9

Sun v. Taiwan, 201 F.3d 1105 (9th Cir. 2000) 10

United States v. Burkholder, 816 F.3d 607 (10th Cir. 2016) 4

United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1602 5
28 U.S.C. § 1603(e) 5, 6
28 U.S.C. § 1605(a)(2) 6
28 U.S.C. § 1610(a) ..... *passim*
28 U.S.C. § 1610(g) 1
Foreign Sovereign Immunities Act 1, 4, 9

Respondent, Islamic Republic of Iran ("Iran") and the Solicitor General both join the Petitioners in urging the Court to grant review of the Seventh Circuit's decision construing the Terrorism Exception to execution immunity, 28 U.S.C. § 1610(g). Petitioners reiterate their position that the Court should review the Seventh Circuit's erroneous construction of this provision and resolve the circuit split regarding this important question.

Petitioners submit this supplemental brief to respectfully urge the Court to also grant review of the Seventh Circuit's second holding – that the commercial use exception to execution immunity, codified at 28 U.S.C. § 1610(a), allows attachment and execution upon a foreign sovereign judgment debtor's property located in the United States only when the property is used by the foreign state itself. The Seventh Circuit's holding represents a significant deviation from the text of the statute, which, by its terms, requires merely that the property be ***used*** in the United States; the statute does not specify that the use must be by the foreign state. *See* 28 U.S.C. § 1610(a).

The Seventh Circuit's construction of section 1610(a) also conflicts with numerous decisions of this Court cautioning lower courts not to judicially expand foreign sovereign immunity beyond the specific immunities conferred under the Foreign Sovereign Immunities Act ("FSIA"). *See* Pet.6-8 (citing cases). Finally, the decision below conflicts with Supreme Court and other decisions holding that foreign state-owned property is not immune when the property is used by

third parties. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 (1976); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945) (citing cases).

A. The Seventh Circuit's decision conflicts with holdings of this Court and of the lower courts of appeals.

The government argues that review of the Seventh Circuit's section 1610(a) holding is not warranted because, in the Solicitor General's words, "[t]hat holding does not conflict with any decision of this Court or another court of appeals. . . ." AC.Br.18-19. While neither this Court nor the lower appellate courts may have had the opportunity to construe the particular aspect of section 1610(a)'s "used for a commercial activity" clause at issue here, the Seventh Circuit's construction conflicts with several decisions of this Court and others construing statutes that are syntactically comparable to section 1610(a). *See* Pet.32-34; Rep.Br.10-12.

For example, the Seventh Circuit's holding conflicts with (and, if given effect, would dramatically restrict) this Court's holding in *Dean v. United States*, 556 U.S. 568, 572 (2009). In *Dean*, the Court held that Congress's use of the passive voice indicates that the statute operates "without respect to a specific actor." *Id.* The Court reaffirmed that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Id.*, *quoting Bates v. United States*, 522 U.S. 23, 29 (1997).

The Seventh Circuit dismissed the Petitioners' argument that *Dean* controls the construction of section 1610(a). The appellate court reasoned: "It's true that a legislature's use of the passive voice ***sometimes*** reflects indifferences to the actor . . . But attributing indifference to Congress in this instance would be inconsistent with the FSIA's statutory declaration of purpose." Pet.App.17 (*emphasis supplied*). *Dean* held that the passive voice ***affirmatively indicates*** that a statute is concerned with "whether something happened – not how or why it happened." 522 U.S. at 29. By qualifying the *Dean* rule with the word "*sometimes*," and then holding that the passive voice in section 1610(a) *creates ambiguity*, the Seventh Circuit effectively overruled this Court's holding in *Dean*, and limited it to the specific statute there at issue. Left intact, the Seventh Circuit's holding would set a precedent empowering other courts to dismiss at will *Dean*'s holding that a statutory use of the passive voice indicates that the statute operates "without respect to a specific actor." *See* 556 U.S. at 572.

Moreover, while the court of appeals said that the *Dean* rule only "sometimes" applies, the Seventh Circuit failed to cite a single instance where a court has construed a statute written in the passive voice to refer to a specific actor. And, it failed to articulate any standard by which to determine when *Dean* applies and when it does not. The Solicitor General similarly fails to identify any authority that would support or limit the Seventh Circuit's implicit rejection of *Dean*. AC.Br.21-22.

Meanwhile, numerous decisions from other appellate courts demonstrate that the *Dean* rule should be applied to construction of the Foreign Sovereign Immunities Act as well as other statutes. *See* Pet.34; Rep.Br.9, 11-12 (*discussing Cassirer and Harrison*); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028 (9th Cir. 2010), *cert. den.*, 564 U.S. 1067 (2011); *Harrison v. Republic of Sudan*, 838 F.3d 86, 91 (2d Cir. 2016); *United States v. Jungers*, 702 F.3d 1066, 1073-74 and n. 6 (8th Cir. 2013) (the language "would be caused" did not limit the application of the statute to a particular class of defendants); *see also*, *United States v. Burkholder*, 816 F.3d 607, 614 (10th Cir. 2016) (citing cases and relying on *Dean* to hold proximate cause is not an element of a sentencing enhancement provision because the passive voice indicates that Congress was concerned with "whether something happened – not how or why it happened"). The Seventh Circuit's treatment of *Dean* conflicts with these holdings, and the Solicitor General makes no effort to address this conflict other than to state that neither *Dean* nor *Cassirer* announced an across-the-board rule." AC.Br.22.

Contrary to the Solicitor General's argument, Petitioners do not suggest that *Dean* articulated an absolute rule that applies in all instances regardless of statutory counter-indications. Petitioners maintain that in the absence of such counter-indications (such as textual ambiguity or inconsistency), the rule articulated in *Dean* must be given effect. *See, e.g.*, Pet.4-8, 32-33 Rep.Br.11-13. As discussed in the Petition (Pet.34-35) and Reply (Rep.Br.11), the statutory Findings and

Declaration of Purpose codified at 28 U.S.C. § 1602 do not provide any basis to deviate from *Dean*. Thus, in the absence of any statutory indications compelling an alternative reading, the statute must be construed as it is written – to accommodate the use by anyone, and not only use by the foreign sovereign.

B. Other provisions of the FSIA demonstrate that the execution immunity exception of section 1610(a) applies where foreign state property is used by third parties.

Neither the FSIA as a whole nor section 1610(a) itself provides any basis to restrict the commercial use to that of the foreign state judgment debtor alone. Moreover, other sections of the FSIA support the plain reading of section 1610(a), which allows execution upon assets that are used by ***anyone*** for commercial activity within the United States.

In its definitional section, the FSIA defines the term, "commercial activity carried on in the United States ***by a foreign state***" as "commercial activity carried on ***by such state*** and having substantial contact with the United States." 28 U.S.C. § 1603(e) (*emphasis supplied*). Congress understood that where it intended to limit commercial activity to that of the subject foreign state, it needed to specify that the foreign state itself must engage in the activity. It is further noteworthy that Congress felt the need to indicate that the activity must be performed by the foreign state itself, not only in the term being defined, but in the definition as

well. Congress must have understood that without this repetition, courts would likely understand that activities of third parties suffice.

Again, in section 1605(a)(2), using the defined term from section 1603(e), Congress specified that the commercial activity necessary to establish jurisdictional immunity must be "carried on in the United States ***by the foreign state***." (*emphasis supplied*). Congress knew the language it needed to use when it sought to limit the application of a provision to conduct by the foreign state and to exclude the conduct of others.

Petitioners do not suggest that Congress should have used the defined term from section 1603(e) in section 1610(a). That would not have worked, because in 1610(a) Congress limited execution to property ***located in*** the United States, not property that has a mere "substantial contact with the United States." Rather, Petitioners refer the Court to the explicit language used in sections 1603(e) and 1605(a)(2) requiring use by the foreign state, to demonstrate that Congress understood that when it intended to limit the use of property to that of the foreign state, it needed to do so explicitly – and did exactly that.

Section 1610(a) conspicuously omits any language restricting the use to that of the foreign state judgment debtor. The only reasonable inference to be drawn from this omission, especially when viewed in contrast with the explicit limitations found in sections 1603(e) and

1605, is that 1610(a) does not require use by the foreign state, itself.

C. This Court's precedents hold that foreign state-owned property is subject to execution when it is used by third parties.

Citing the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-704 (1976), the Solicitor General argues that judicial seizure of a foreign state's property that is used by a third party increases the risk of affronting the dignity of the foreign state beyond any affront that would be perceived if the foreign state itself were using the property. AC.Br.20. The Solicitor General then cites the Seventh Circuit's decision as authority for itself, when the government posits: "a foreign state cannot lose its immunity based on the commercial activity of a third party." AC.Br.21, citing Pet.App.20.

Alfred Dunhill focused on the distinction between commercial and other private conduct of a foreign state on one hand, and distinctly governmental conduct on the other. 425 U.S. at 698 (discussing the shift from the absolute theory of foreign sovereign immunity to the restrictive theory). Significantly, and contrary to the Solicitor General's reasoning (and that of the Seventh Circuit) *Alfred Dunhill* indicates that where a third party uses property that is owned by a foreign state the rationale supporting immunity is minimized rather than enhanced. *Id.* at 699. The Court discussed its earlier decision in *Republic of Mexico v. Hoffman*, 324

U.S. 30 (1945). There, despite applying the absolute theory of foreign sovereign immunity, the Court unanimously denied immunity to a Mexican owned ship ***precisely because*** it was in the possession and use of a third party. *See Alfred Dunhill*, 425 U.S. at 699-700 and n. 13.

In *Republic of Mexico*, the Court noted that while the State Department conceded that the ship was owned by the government of Mexico, it refrained from requesting immunity because the ship was not in the foreign state's possession. *Republic of Mexico*, 324 U.S. at 37. The Court held that mere ownership by a foreign state does not render property immune. Rather, the Court held, property of a foreign state becomes immune only when it is devoted to the public use ***and*** "employed in carrying on the operations of the government." *Id.* (*citations omitted*). The Court recognized that the "overwhelming weight of authority" supported its conclusion that foreign sovereign immunity claims based upon title without possession fail. *Id.* at 37-38 (citing cases).

If mere possession by a third party of foreign state-owned property precluded immunity under the absolute theory of immunity, surely, the possession and use by a third party should negate any immunity under the restrictive theory. Thus, rather than supporting the Seventh Circuit's decision, *Alfred Dunhill* and *Republic of Mexico v. Hoffman* demonstrate that the Seventh Circuit's construction of the passive voice in section 1610(a) conflicts with a basic and long-standing premise of foreign sovereign immunity. And, as the Court

reaffirmed in *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010), the Foreign Sovereign Immunities Act was intended to codify international practice and relevant common law in effect at the time of the FSIA's enactment. *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613-14 (1992) (observing that the FSIA was enacted less than six months after the decision was rendered in *Alfred Dunhill* and concluding that this decision is of "significant assistance" in construing the FSIA).

D. The University's use of the assets constitutes use of a commercial nature under the FSIA and any uncertainty as to this question does not preclude review.

The government asserts that this case would be a poor vehicle for review of the Seventh Circuit's construction of section 1610(a) because the court of appeals was "skeptical" as to whether the University's use of the artifacts constitutes "commercial use" under the FSIA. AC.Br.22. The government also relies upon Iran's "belief" that no party has used the artifacts for commercial activity. *See ibid.* The government claims to take no position on this issue. But, the government argues that the mere uncertainty makes this case a poor vehicle for review. *Ibid.*

The government is wrong. The question presented under section 1610(a) is a pure question of law. Moreover, the Court often grants review notwithstanding a need for the lower court to address collateral issues

upon remand. *See, e.g.*, *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

Finally, the University's activities are commercial, as that term is applied under the FSIA. In *Weltover*, 504 U.S. at 614, the Court explained that conduct is "commercial" under the FSIA when it is the type of activity that ***can*** be engaged in by private citizens. The Petitioners demonstrate in their Petition (Pet.5-6, 15) and Reply Brief (Rep.Br.13) that the University's use of the artifacts constitutes "commercial" used under the FSIA. *See* Rep.Br.13, *citing Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) ("There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign."), and *Sun v. Taiwan*, 201 F.3d 1105, 1108-09 (9th Cir. 2000) (conducting a non-profit cultural tour and compiling a linguistic treatise found to be commercial activities under the FSIA, because they are the types of activities sometimes performed by non-sovereigns).

CONCLUSION

For the reasons stated above as well as those stated in the Petition and Reply Brief, the Petition should be granted as to both questions presented.

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RECORD AND BRIEFS

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No. 16-534

In the Supreme Court of the United States

JENNY RUBIN, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Ordinarily, a person who obtains a judgment against a foreign state cannot execute against the property of that state's agencies or instrumentalities, because they are separate juridical entities. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). In 28 U.S.C. 1610(g), Congress overrode that barrier in certain cases involving state-sponsored terrorism, allowing victims to enforce a judgment entered against a foreign state by piercing the veil between the state and its agencies and instrumentalities, thereby treating the property of an agency or instrumentality as property of the state itself for purposes of execution. Section 1610(g) provides, however, that such property is subject to execution only "as provided in this section." *Ibid.* The question presented is:

Whether, in addition to piercing the veil, Section 1610(g) also enables execution against foreign sovereign property that is not subject to execution as provided elsewhere in Section 1610.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
Section 1610(g) does not create a freestanding exception to the immunity of foreign sovereign property from execution 11
A. Section 1610(g) provides for veil piercing 11
B. Section 1610(g) subjects property to execution "as provided in this Section," not "regardless of what is provided in this Section" 16
C. Petitioners' interpretation of Section 1610(g) would defeat limitations Congress imposed on the same creditors in Section 1610(a)(7) 22
D. Petitioners' reliance on the statutory purpose and legislative history is misplaced 28
Conclusion 33
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alejandre v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999) 14
Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 32
Bennett v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016) 9, 17, 18, 28
Connecticut Bank of Commerce v. *Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) 31
Corley v. *United States*, 556 U.S. 303 (2009) 22

Cases—Continued: Page

Department of Homeland Sec. v. *MacLean*, 135 S. Ct. 913 (2015) 16
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 7, 12, 26
First Nat'l City Bank v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 2, 6, 12, 26
Flatow v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003) 7, 14, 26
Greenlaw v. *United States*, 554 U.S. 237 (2008) 24
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 19
Lamie v. *United States Tr.*, 540 U.S. 526 (2004) 19
Milner v. *Department of Navy*, 562 U.S. 562 (2011) 30
Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. *Elahi*, 556 U.S. 366 (2009) 30
Mohamad v. *Palestinian Auth.*, 566 U.S. 449 (2012) 28, 30
Morrison v. *National Austl. Bank Ltd.*, 561 U.S. 247 (2010) 30
NLRB v. *SW Gen., Inc.*, 137 S. Ct. 929 (2017) 18
Permanent Mission of India to the U.N. v. *City of New York*, 551 U.S. 193 (2007) 11
Republic of Argentina v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) 2, 3, 31
Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 31
Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 30
Republic of Philippines v. *Pimentel*, 553 U.S. 851 (2008) 30
Rodriguez v. *United States*, 480 U.S. 522 (1987) 30
Taylor v. *Standard Gas & Elec. Co.*, 306 U.S. 307 (1939) 6

Case—Continued: Page

Walter Fuller Aircraft Sales, Inc. v. *Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992) 7

Treaties and statutes:

Vienna Convention on Diplomatic Relations, Art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 29

Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869 19

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.* 1

28 U.S.C. 1603(a) 2, 4, 2a

28 U.S.C. 1603(b)(1) 27, 2a

28 U.S.C. 1603(b)(3) 26, 3a

28 U.S.C. 1604 ..... 2, 3a

28 U.S.C. 1605-1607 2

28 U.S.C. 1605(a)(7) (Supp. II 1996) 3

28 U.S.C. 1605A ..... *passim*, 12a

28 U.S.C. 1605A(a) 3, 12a

28 U.S.C. 1605A(a)(1) 25, 12a

28 U.S.C. 1605A(a)(2) 20, 25, 12a

28 U.S.C. 1605A(a)(2)(A)(i)(II) 20, 13a

28 U.S.C. 1605A(c) 3, 25, 14a

28 U.S.C. 1605A(d) 20, 15a

28 U.S.C. 1605A(e)(1) 20, 15a

28 U.S.C. 1605A(e)(2) 20, 15a

28 U.S.C. 1605A(f) 20, 15a

28 U.S.C. 1605A(g) 20, 16a

28 U.S.C. 1605A(h) 20, 16a

28 U.S.C. 1606 ..... 21, 18a

28 U.S.C. 1609 ..... 3, 29, 30, 22a

28 U.S.C. 1610 ..... *passim*, 22a

28 U.S.C. 1610(a) 4, 8, 32, 22a

Statutes—Continued: Page

28 U.S.C. 1610(a)-(g) 4
28 U.S.C. 1610(a)(7) ..... *passim*, 23a
28 U.S.C. 1610(b) 4, 6, 15, 18, 22, 23a
28 U.S.C. 1610(b)(3) 4, 24, 24a
28 U.S.C. 1610(c) 4, 15, 21, 22, 24a
28 U.S.C. 1610(d) 4, 15, 24a
28 U.S.C. 1610(e) 4, 15, 25a
28 U.S.C. 1610(f) ..... *passim*, 25a
28 U.S.C. 1610(f)(1) 5, 15, 16, 17, 18, 25a
28 U.S.C. 1610(f)(2) 5, 18, 22, 26a
28 U.S.C. 1610(f)(3) 5, 17, 32, 26a
28 U.S.C. 1610(g) ..... *passim*, 27a
28 U.S.C. 1610(g)(1) ..... *passim*, 27a
28 U.S.C. 1610(g)(1)(C) 27, 27a
28 U.S.C. 1610(g)(2) 17, 27a
28 U.S.C. 1610(g)(3) 17, 28a
28 U.S.C. 1611 ..... 3, 29, 30, 28a
28 U.S.C. 1611(b) 29, 28a
Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260 24
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:
§ 1083, 122 Stat. 338 ..... 10, 19
§ 1083(a), 122 Stat. 338 19
§ 1083(a)(1), 122 Stat. 338-340 ..... 3, 20
§ 1083(a)(1), 122 Stat. 338 19
§ 1083(a)(1), 122 Stat. 339 20
§ 1083(b), 122 Stat. 341 19
§ 1083(b)(1), 122 Stat. 341-342 3
§ 1083(b)(1)(C), 122 Stat. 341 20

Statutes—Continued: Page

§ 1083(b)(3)(A), 122 Stat. 341 24
§ 1083(b)(3)(C), 122 Stat. 341 20
§ 1083(b)(3)(D), 122 Stat. 341-342 ..... 6, 19, 20
§ 1083(b)(3)(D), 122 Stat. 341 24
§ 1083(c)(1), 122 Stat. 342 20
§ 1083(c)(2), 122 Stat. 342-343 3
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note) 8
1 U.S.C. 204(a) 19

Miscellaneous:

Ian Brownlie, *Principles of Public International Law* (5th ed. 1998) 31
151 Cong. Rec. 12,869 (2005) 29
154 Cong. Rec. 500 (2008) 14, 29
63 Fed. Reg. 59,201 (Oct. 21, 1998) 5
65 Fed. Reg. 66,483 (Oct. 28, 2000) 5, 32
H.R. Conf. Rep. No. 447, 110th Cong., 1st Sess. (2007) 29
Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 31

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INTEREST OF THE UNITED STATES

This case concerns the interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* Litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

Although the United States agrees with respondents that the court of appeals correctly resolved the question presented in this case, the United States emphatically condemns the terrorist actions that gave rise to this case, and expresses its deep sympathy for the victims and their family members who have pursued legal action against Iran. The United States is committed to vigorously pursuing those responsible for violence against U.S. nationals.

STATEMENT

Ordinarily, a person who obtains a judgment against a foreign state cannot execute against the property of that state's agencies or instrumentalities, because they are separate juridical entities. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). In 28 U.S.C. 1610(g), Congress overrode that rule in certain cases involving state-sponsored terrorism, allowing victims to pierce the veil between a foreign state and its agencies and instrumentalities, and thereby to treat the property of an agency or instrumentality as property of the state itself for purposes of execution. Section 1610(g) provides, however, that such property is subject to execution "as provided in this section." *Ibid.* The question in this case is whether subsection (g) makes property subject to execution only when Section 1610 otherwise provides an exception to the immunity of foreign sovereign property from execution, or whether it is a freestanding exception that makes property subject to execution regardless of what is otherwise provided in that Section. To answer that question, it is important first to understand the statutory context.

1. a. The FSIA comprehensively regulates the immunity of foreign sovereigns from suit and the immunity of foreign sovereign property from execution. See *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014). With respect to jurisdictional immunity, the FSIA provides (subject to certain international agreements) that a foreign state and its agencies and instrumentalities "shall be immune" from suit, except as provided in Sections 1605 through 1607. 28 U.S.C. 1604; see 28 U.S.C. 1603(a) (defining "foreign state" to include an agency or instrumentality).

In 1996, Congress added a "terrorism exception" to the FSIA. See 28 U.S.C. 1605(a)(7) (Supp. II 1996). That exception provided that a designated state sponsor of terrorism was not immune from suit seeking money damages for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such acts. *Ibid.*

In the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a)(1) and (b)(1), 122 Stat. 338-342, Congress replaced that provision with a new version of the terrorism exception, codified at 28 U.S.C. 1605A. Section 1605A abrogates jurisdictional immunity from suit, creates a private right of action for certain injuries caused by designated state sponsors of terrorism, and permits an award of punitive damages in such an action. 28 U.S.C. 1605A(a) and (c). Congress also allowed plaintiffs in certain circumstances to convert suits under the former version of the terrorism exception to suits under the current version. NDAA § 1083(c)(2), 122 Stat. 342-343.

b. The FSIA's rules regarding immunity from execution are independent of its rules regarding immunity from suit, and the exceptions to execution immunity are "narrower." *NML Capital*, 134 S. Ct. at 2256. Specifically, the FSIA provides (subject to certain international agreements) that the property of a foreign state, and its agencies and instrumentalities, "shall be immune from attachment arrest and execution," except as provided in 28 U.S.C. 1610 and 1611. 28 U.S.C. 1609.[1]

Section 1610 sets forth limited exceptions to the general rule of immunity in Section 1609. It consists of

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[1] This brief uses "execution" to refer to attachment, arrest, and execution.

seven subsections, (a) through (g). Subsections (a) and (b) create exceptions for property with a commercial nexus to the United States. Subsection (a) provides that the property of a foreign state, agency, or instrumentality "shall not be immune" from execution if that property is "used for a commercial activity in the United States" and additional criteria are satisfied. 28 U.S.C. 1610(a); see 28 U.S.C. 1603(a). Subsection (b) creates a further exception for the property of an agency or instrumentality specifically. Unlike property covered by subsection (a)—which must *itself* be used in commercial activity—subsection (b) provides that any property of an agency or instrumentality "shall not be immune" from execution if the agency or instrumentality is "engaged in commercial activity in the United States" and additional criteria are satisfied. 28 U.S.C. 1610(b).

Under the additional criteria in subsections (a) and (b), property with the requisite commercial nexus is not immune from execution if the judgment that the plaintiff is seeking to enforce relates to a claim for which the entity "is not immune" under the current or former version of the terrorism exception. 28 U.S.C. 1610(a)(7) and (b)(3). Accordingly, subsections (a)(7) and (b)(3) enable a person with a money judgment obtained under the terrorism exception to execute against property with the requisite commercial nexus.

Subsections (c), (d), and (e) are not relevant here. Pets. Br. 39; see 28 U.S.C. 1610(c) (requiring notice in certain cases before an "execution referred to in subsections (a) and (b)"); 28 U.S.C. 1610(d) (prejudgment attachment with an express waiver); 28 U.S.C. 1610(e) (execution against vessels).

Subsection (f) creates a mechanism for executing terrorism judgments against blocked property, but that

mechanism has never been operative. Paragraph (f)(1) provides that, "[n]otwithstanding any other provision of law," certain assets blocked under various sanctions programs "shall be subject to execution" of "any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune" under either version of the terrorism exception. 28 U.S.C. 1610(f)(1). Paragraph (f)(2) provides that the State Department and Treasury Department "should make every effort" to assist terrorism judgment creditors in identifying executable property. 28 U.S.C. 1610(f)(2). Paragraph (f)(3) provides, however, that "[t]he President may waive any provision of paragraph (1) in the interest of national security." 28 U.S.C. 1610(f)(3). Invoking that authority, the President waived paragraph (f)(1) before it went into effect. 65 Fed. Reg. 66,483 (Oct. 28, 2000); see 63 Fed. Reg. 59,201 (Oct. 21, 1998) (waiver of predecessor statute).

Subsection (g) is the heart of this case. It provides:

> Subject to [certain protections for third-party joint property holders], the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
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> (A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. 1610(g)(1). Congress added subsection (g) in 2008, when it adopted the current version of the terrorism exception and amended subsections (a) and (b) to apply to such judgments. NDAA § 1083(b)(3)(D), 122 Stat. 341-342.

Subsection (g) permits creditors in covered terrorism cases to "pierce the veil" when seeking to enforce their judgment, when otherwise they would ordinarily be unable to do so. In *Bancec*, this Court recognized a general presumption that courts should respect the separate juridical status of a state's agencies and instrumentalities. 462 U.S. at 626-628. Accordingly, under *Bancec*, a creditor of a judgment against a foreign state ordinarily cannot satisfy that judgment by executing against the property of an agency or instrumentality. The presumption of separateness may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created," or if recognizing the entity's separate juridical status would "'work fraud or injustice.'" *Id.* at 629 (quoting *Taylor* v. *Standard Gas & Elec. Co.*, 306

U.S. 307, 322 (1939)); see *id.* at 633. Some courts had identified "*Bancec* factors" to consider in making that determination. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). The five factors listed in subsection (g) parallel almost perfectly those factors. Pet. App. 23-26.

Subsection (g) thus makes it easier to pierce the veil in enforcing covered terrorism judgments: A creditor in such a case may enforce a judgment against a state by executing against property of the state *and* its agencies or instrumentalities. This enhanced veil piercing also extends to corporations owned by the state, agency, or instrumentality. See 28 U.S.C. 1610(g)(1) (including "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity"); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-478 (2003) (a wholly owned subsidiary of an agency or instrumentality ordinarily is not itself an agency or instrumentality).

Subsection (g) provides, however, that such property is subject to execution "as provided in this section." 28 U.S.C. 1610(g)(1). The question in this case is whether that means the creditor must satisfy an exception to immunity as provided elsewhere in Section 1610, or whether subsection (g) not only provides for veil piercing but also eliminates the need to satisfy an exception to immunity elsewhere in Section 1610.

2. a. Petitioners hold a $71.5 million judgment against Iran arising out of Iran's role in a 1997 terrorist attack. Pet. App. 1-2. They obtained the judgment under the former version of the terrorism exception, then converted it to a judgment under the current version.

Id. at 5-6 & n.1; see p. 3, *supra*. Petitioners registered their judgment in the Northern District of Illinois and sought to execute against the Persepolis Collection, a collection of ancient Persian artifacts. Pet. App. 2-3. The collection is owned by Iran and has been on loan to the University of Chicago since 1937 for research, translation, and cataloging. *Id.* at 4-5, 46. The collection comprises "roughly 30,000 clay tablets and fragments containing some of the oldest writings in the world." *Id.* at 4-5.

The district court granted summary judgment to respondents, holding that the Persepolis Collection is immune from execution. Pet. App. 43-71. First, the court held that the commercial-activity exception in Section 1610(a) does not permit execution. The court concluded that subsection (a) applies only when the foreign state itself uses the property for commercial activity, and Iran had not so used the Persepolis Collection. *Id.* at 50-57. Second, the court held that Section 1610(g) does not provide a basis for execution either, because it is not a freestanding exception to immunity. *Id.* at 57-62. Rather, the court concluded, subsection (g) permits execution only "*as provided in this section*," and no other provision in Section 1610 provides an exception to immunity here. *Id.* at 61.[2]

b. The court of appeals affirmed. Pet. App. 1-38. The court of appeals agreed with the district court that subsection (a) did not permit execution because it

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[2] The district court also held that the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note), did not authorize execution because the Persepolis Collection is not a "blocked asset[]," as required under TRIA. Pet. App. 65-67. The court of appeals affirmed that determination, *id.* at 35-38, and that ruling is not at issue here.

reaches only property used in commercial activity by the foreign state itself, not by a third party. *Id.* at 16-21. The court of appeals also agreed with the district court (and the United States) that subsection (g) does not provide a basis for executing against the artifacts because it is not a freestanding exception to immunity and no other provision of Section 1610 provided for execution. *Id.* at 21-35. The court of appeals explained that subsection (g)'s phrase "as provided in this section" means that an individual must show that an immunity exception elsewhere in Section 1610 applies. *Ibid.* The court recognized that the Ninth Circuit had reached a contrary conclusion, but it found the Ninth Circuit's decision unpersuasive. *Id.* at 34; see *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016).

SUMMARY OF ARGUMENT

Petitioners do not dispute that 28 U.S.C. 1610(g) serves to pierce the veil between a foreign state and its agencies and instrumentalities. They contend, however, that this provision does two things, not one. In particular, they contend that subsection (g) also creates a freestanding exception to immunity that allows execution against property even when no other provision of Section 1610 would allow for it. Petitioners are incorrect.

Section 1610(g) is not a freestanding exception to immunity because it subjects property to execution only "as provided in this section." 28 U.S.C. 1610(g)(1). It thus is expressly tied to the other provisions of Section 1610. Petitioners fail to give that clause any meaning, and indeed effectively interpret it to mean "regardless of what is provided in this section."

Petitioners posit that "as provided in this section" might refer solely to subsection (f), or might actually be

a mistake that should refer not to "this section" (Section 1610) of the U.S. Code but instead to the Section of the Public Law that added subsection (g) to 28 U.S.C. 1610. But neither of those interpretations gives "as provided in this section" any practical significance. Subsection (f)'s execution provisions were waived by the President before subsection (g) was enacted and have never been operative. And the relevant section of the Public Law (Section 1083 of the NDAA) does not provide for execution either. In any event, petitioners' interpretations lack merit. Congress would not say "this section" if it meant only subsection (f). And there is no basis for concluding that "this section" in 28 U.S.C. 1610(g) refers to anything but 28 U.S.C. 1610 itself.

Petitioners' interpretation of subsection (g) would also defeat limitations Congress expressly imposed on execution elsewhere in the FSIA. In 28 U.S.C. 1610(a)(7), Congress enabled a victim holding a judgment under the current version of the terrorism exception to execute against the state's property—but only when it is used for commercial activity in the United States. Yet petitioners' interpretation of subsection (g) would enable the same creditor to execute the same judgment against the same state's property without that crucial limitation. Subsection (g) would thus render Congress's decision to impose that limitation on those creditors in subsection (a)(7) entirely superfluous.

The legislative history of subsection (g) further illustrates that Congress was focused solely on piercing the veil in terrorism cases—and not on overriding the limitations on execution that are set forth elsewhere in Section 1610. Moreover, interpreting subsection (g) as unmoored from Section 1610's limitations would threaten to

cause the reciprocity and other foreign-relations repercussions that Congress enacted those constraints to avoid. Indeed, this case illustrates the point. Seizing a collection of ancient Persian artifacts on loan to a university museum presents foreign-policy ramifications that are different in kind from executing against state-owned property used in commercial activity. If Congress had intended for subsection (g) to reach property without regard to the commercial-nexus or other requirements of Section 1610, it would have said so. It would not have said that property is subject to execution only "as provided in th[at] section." 28 U.S.C. 1610(g)(1).

ARGUMENT

SECTION 1610(g) DOES NOT CREATE A FREESTANDING EXCEPTION TO THE IMMUNITY OF FOREIGN SOVEREIGN PROPERTY FROM EXECUTION

A. Section 1610(g) Provides For Veil Piercing

1. The analysis under the FSIA "begin[s], as always, with the text of the statute." *Permanent Mission of India to the U.N.* v. *City of New York*, 551 U.S. 193, 197 (2007). The text establishes that subsection (g) provides for veil piercing, but does not in addition allow execution regardless of the other provisions of Section 1610. Rather, it subjects additional entities' property to execution only "as provided in th[at] section." 28 U.S.C. 1610(g). Subsection (g) thus is not a stand-alone exception to immunity; it is expressly linked to the other exceptions in Section 1610.

a. Subsection (g) consists of a single sentence. It provides in relevant part:

> [T]he property of a foreign state against which a judgment is entered under Section 1605A, and the

> property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of [the *Bancec* factors].

28 U.S.C. 1610(g)(1). Because this sentence is dense, it helps to break it into its components.

First, there must be "a foreign state against which a judgment is entered under Section 1605A." 28 U.S.C. 1610(g). Section 1605A is the current version of the terrorism exception, so subsection (g) comes into play when a victim of terrorism has obtained a judgment under that provision against a designated state sponsor of terrorism.

Second, subsection (g) overrides the ordinary rule for piercing the veil in FSIA cases. Ordinarily, a creditor with a judgment against a foreign state can execute only against that state's own property; if property is owned not by the state itself but by an agency or instrumentality (or a corporation or other separate entity owned by the state, agency, or instrumentality), it would be out of reach, unless unusual circumstances justified piercing the veil and treating that separate entity as if it were the foreign state itself. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-478 (2003).

Subsection (g) plainly overrides that rule for creditors of judgments obtained under the current version of the terrorism exception: Those creditors can potentially reach not merely "the property of [the] foreign

state" itself, but also "the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. 1610(g)(1). And such veil piercing may occur "regardless of" the *Bancec* factors that courts would otherwise have considered. *Ibid.*; see Pet. App. 23-26.

Third, and critical to the resolution of this case, subsection (g) then specifies what can happen to the property in that broader pool: It is "subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section.*" 28 U.S.C. 1610(g)(1) (emphasis added). That is, the property of the state, agency, or instrumentality (including property that is or is held in another separate entity) is subject to execution "as provided in" other provisions of Section 1610.

Subsection (g) thus makes it easier for victims of terrorism to pierce the veil between a state and its agencies and instrumentalities. By the statute's plain terms, however, a plaintiff can subject those entities' property to execution only "as provided in this section." 28 U.S.C. 1610(g)(1). Consequently, even if a creditor invokes subsection (g) to pierce the veil, the creditor still must satisfy one of the exceptions to immunity "provided in" Section 1610 to execute against that property.

In short, subsection (g) consists of one sentence with one subject: veil piercing. It does not also take the very different step of enabling a creditor to execute a judgment without regard to the exceptions to immunity provided in Section 1610. Instead, subsection (g) works together with Section 1610's existing exceptions by magnifying their impact: It makes more entities' property amenable to execution under those exceptions, and

thereby places more property within the potential reach of victims of terrorism.

For example, before subsection (g) was enacted in 2008, a victim's family with a judgment against Iran under the terrorism exception could not invoke subsection (a)(7) to execute against California real estate that was owned by a wholly-owned subsidiary of Bank Saderat Iran, an instrumentality of Iran. *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1067, 1075 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003). The judgment was against Iran, not the Bank; and applying the *Bancec* factors, the Ninth Circuit held that the family had not overcome *Bancec*'s presumption that the Bank was a separate juridical entity. *Id.* at 1071-1074. Accordingly, the family could not treat the property as Iran's. Subsection (g) removes that barrier to execution: It would enable treatment of the Bank subsidiary's real estate for purposes of subsection (a)(7) as if it were the state's own property. See 154 Cong. Rec. 500 (2008) (statement of Sen. Lautenberg) (explaining that subsection (g) would abrogate *Flatow*).

Similarly, before subsection (g) was enacted, victims' families that held judgments against Cuba under the terrorism exception could not use Section 1610 to garnish commercial debts owed by Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), an instrumentality of Cuba. *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1279-1280, 1283 (11th Cir. 1999). Without deciding whether Section 1610 would permit execution if they pierced the veil, the court held that the families could not do so: The judgment was against Cuba, not ETECSA; and applying the *Bancec* factors, the court held that the families

had not overcome the presumption of separateness. *Id.* at 1282-1290. Subsection (g) removes that barrier.

Unlike in cases like *Flatow* and *Alejandre*, however, subsection (g)'s veil-piercing rule does not help petitioners in this case because the corporate veil is not a barrier to execution here. Petitioners' judgment is against Iran, and Iran itself (not an agency or instrumentality) owns the Persepolis Collection. Petitioners instead are trying to use subsection (g) to circumvent the existing limitations on executing against a foreign state's property that are set forth in Section 1610. They cannot do so, because subsection (g) subjects property to execution only "as provided in th[at] section." 28 U.S.C. 1610(g)(1).

No other subsection of Section 1610 "provide[s]" for execution here. Subsection (a) can potentially provide for execution of a judgment obtained under the current version of the terrorism exception, and petitioners have obtained such a judgment against Iran. See 28 U.S.C. 1610(a)(7). But that exception reaches only property with the requisite commercial nexus, which the Collection lacks. Pet. App. 16-21. It is undisputed that subsections (b), (c), (d), and (e) do not provide for execution here. See Pets. Br. 39. Nor does subsection (f) provide for execution, because the President has exercised his authority to waive subsection (f)(1). See pp. 4-5, *supra*; Pet. App. 33-34. The court of appeals therefore correctly held that petitioners cannot execute against the Collection.

B. Section 1610(g) Subjects Property To Execution "As Provided In This Section," Not "Regardless Of What Is Provided In This Section"

1. Petitioners' interpretation of subsection (g) as a freestanding exception to execution immunity is fundamentally inconsistent with Congress's express direction that property is subject to execution only "as provided in this section." 28 U.S.C. 1610(g)(1). On petitioners' interpretation, that phrase would be essentially meaningless because the statute would function exactly the same way even if it were deleted. Indeed, petitioners effectively read "as provided in this section" to mean "regardless of what is provided in this section."

The notion that Congress said "as provided" when it meant "regardless of what is provided" is particularly implausible here. In subsection (g), Congress expressly stated that a terrorism creditor may pierce the veil "regardless of" the *Bancec* factors. 28 U.S.C. 1610(g)(1). If Congress had intended to allow such a creditor also to execute against property even when none of Section 1610's exceptions were satisfied, one would expect Congress to have said so using parallel language, such as by stating that property is subject to execution "regardless of" the *Bancec* factors *and* "regardless of the provisions of this section." Congress did not do so. Congress's choice to expressly set aside some barriers to execution (the *Bancec* inquiry), but not others (the limitations "provided in this section"), is appropriately treated as deliberate. Cf. *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

The textual differences between subsections (f) and (g) reinforce this reading. Subsection (f)(1) provides

that, absent Presidential waiver, certain blocked property "shall be subject to execution" of a terrorism judgment "[n]otwithstanding any other provision of law." 28 U.S.C. 1610(f)(1) and (3). And unlike subsection (g), subsection (f)(1) does not further state that such property is subject to execution only "as provided in this section." Subsection (f)(1) is thus naturally read to create a freestanding exception that can allow execution even when no other provision of Section 1610 permits it. By contrast, Congress did not say that subsection (g) applies "[n]otwithstanding any other provision of law." To the contrary, Congress specified that subsection (g) makes property subject to execution only "as provided in this section," 28 U.S.C. 1610(g)(1), thus affirmatively establishing that subsection (g) is *not* freestanding. Rather, subsection (g) simply provides for veil piercing to make more entities' property subject to execution as provided elsewhere in Section 1610.

2. Petitioners make multiple attempts to explain the meaning of the phrase "as provided in this section," but none is persuasive.

a. Petitioners first contend (Br. 44) that subsection (g)'s reference to "this section" actually refers solely to subsection (f). See *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016). But as the court of appeals explained, "it would be very odd" for Congress to refer solely to subsection (f) in that way. Pet. App. 27. Congress would not be expected to say "this section" if it really meant "as provided in *sub*section (f)." *Id.* at 33. Indeed, Congress demonstrated in subsection (g) that it knew how to write precise cross-references. See 28 U.S.C. 1610(g)(1), (2), and (3) ("Subject to para-

graph (3), the property of a foreign state"; "Any property * * * to which paragraph (1) applies"; "Nothing in this subsection shall be construed.").

Petitioners admit (Br. 37, 44) that it is "strained" to interpret "this section" to mean "that other subsection." They argue, however, that the court of appeals' interpretation suffers from the same problem by interpreting "this section" to refer solely to subsections (a) and (b). But the court of appeals did not adopt that interpretation. Rather, the court correctly concluded that "[t]he word 'section' must mean what it says: Subsection (g) modifies *all* of § 1610." Pet. App. 27; cf. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017). The court looked to subsection (a) in particular when analyzing potential exceptions because that was the only exception petitioners contended was applicable. See Pet. App. 14.

Petitioners' construction is not merely implausible, but also would be self-defeating. Even if "as provided in this section" meant only "as provided in subsection (f)," petitioners still would be unable to execute on the property here because subsection (f) does not provide for execution in this case. Subsection (f)'s only provision that potentially authorizes execution (paragraph (1)) was waived by the President in 2000 before it ever went into effect, and well before Congress enacted subsection (g) in 2008. See pp. 4-6, *supra*. So subsection (f)(1), "being inoperative from the start, does not allow *any* form of execution." Pet. App. 34.[3]

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[3] Paragraph (f)(2) has not been waived. See *Bennett*, 825 F.3d at 959-960 & n.5. But that paragraph does not help petitioners because it does not provide for execution; it states that the government "should make every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2).

b. For the first time in this litigation, petitioners now contend in the alternative that the phrase "as provided in this section" is a mistake, asserting that it refers not to the section of the U.S. Code where Congress codified it, 28 U.S.C. 1610, but to the section of the Public Law that enacted it, Section 1083 of the NDAA. This argument lacks merit.

Title 28 of the U.S. Code has "been enacted into positive law"; it is not merely an editorial compilation that is prima facie evidence of the law. 1 U.S.C. 204(a); see Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869. Petitioners do not point to any textual or contextual indication that "this section" in subsection (g) means anything other than Section 1610 of Title 28 as enacted into positive law. Petitioners thus are merely speculating that Congress made a drafting error. But "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

In any event, Congress made no error. In Section 1083(a) of the NDAA, Congress added the current version of the terrorism exception (Section 1605A) to "title 28, United States Code." § 1083(a)(1), 122 Stat. 338. Congress then made "Conforming Amendments" to the U.S. Code, *id.* § 1083(b), 122 Stat. 341, including by adding subsection (g) to 28 U.S.C. 1610. Specifically, Congress provided that "Section 1610 of title 28, United States Code is amended" by adding, in quotation marks, the full text of subsection (g). *Id.* § 1083(b)(3)(D), 122 Stat. 341-342. Congress thus inserted "as provided in this section" directly into "Section 1610 of title 28."

Ibid. "[T]his section" therefore plainly refers to "Section 1610 of title 28." *Ibid.*

Other amendments to the U.S. Code reinforce that this choice was deliberate. When Congress was amending the U.S. Code, it consistently used "section," "subsection," or "paragraph" to refer to the U.S. Code. *E.g.*, NDAA § 1083(a)(1), 122 Stat. 338-340 (adding 28 U.S.C. 1605A(a)(2), (c), (d), (e)(1), (e)(2), (f), (g), and (h)); *id.* § 1083(b)(1)(C), (b)(3)(C) and (D), 122 Stat. 341-342. By contrast, Congress used "this section" to refer to the Public Law only when Congress was not changing the U.S. Code at all. See Pets. Br. 47 (recognizing this pattern); *e.g.*, NDAA § 1083(c)(1), 122 Stat. 342. And when Congress intended for the U.S. Code to refer to a section of the Public Law, it did so expressly: Congress inserted 28 U.S.C. 1605A(a)(2)(A)(i)(II), which refers to "an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act." NDAA § 1083(a)(1), 122 Stat. 339.

There is thus no sound basis for concluding that Congress mistakenly said "this section" in 28 U.S.C. 1610(g) when Congress was otherwise so precise. Petitioners note (Br. 46) that an earlier version of Section 1610(g) erroneously referred to a "judgment entered under this section," when it really meant a judgment entered under Section 1605A. But as petitioners recognize (*ibid.*), Congress corrected that language before the bill was enacted into law. As enacted, subsection (g) refers to a judgment "entered under section 1605A." 28 U.S.C. 1610(g)(1). That drafting history thus undermines petitioners' argument: It shows that Congress carefully ed-

ited the references in subsection (g) to correct any mistakes, but did *not* change "as provided in this section." That further underscores that Congress meant what it said.

Petitioners' speculation that "as provided in this section" refers to the NDAA also would make that phrase effectively meaningless. Petitioners assert (Br. 48) that it indicates that subsection (g) "override[s] the prohibition on punitive damages contained in [28 U.S.C.] 1606." But no such prohibition applies here in the first place. The prohibition on punitive damages applies only to a claim where "a foreign state is not entitled to immunity under section 1605 or 1607." 28 U.S.C. 1606. A person needs to have a judgment under a different section of the U.S. Code (Section 1605A) in order to invoke subsection (g). See 28 U.S.C. 1610(g)(1). Section 1606's prohibition on punitive damages is thus inapplicable in subsection (g) cases. Indeed, Section 1605A's private right of action expressly allows "punitive damages." 28 U.S.C. 1605A(c). And it would be incongruous for Section 1610(g) to say anything about the kinds of damages that are available in the underlying suit, because Section 1610 comes into play only after the suit is over and the plaintiff is seeking to enforce the judgment.

c. Petitioners' amici offer yet another explanation, contending that "as provided in this section" refers only to Section 1610's procedures but not its substantive requirements. See Former Officials Amici Br. 23-25. But Section 1610 does not provide any procedures that would ever apply to execution under petitioners' interpretation of subsection (g). The only provision in Section 1610 that establishes procedures for execution is subsection (c), which requires notice in certain cases—

but it applies only to "execution referred to in subsections (a) and (b)." 28 U.S.C. 1610(c). Under petitioners' interpretation, however, nobody using subsection (g) would ever execute under subsections (a) or (b), because those same creditors could reach all the same property and more through subsection (g) itself. See pp. 22-25, *infra*. Subsection (c)'s procedures thus would never apply in a subsection (g) case. Amici also point (Br. 24) to subsection (f)(2), but that does not establish procedures for execution at all; it encourages federal agencies to assist plaintiffs in locating executable assets. 28 U.S.C. 1610(f)(2); see p. 18 n.3, *supra*. Amici's interpretation is thus functionally equivalent to deleting "as provided in this section" from subsection (g).

C. Petitioners' Interpretation Of Section 1610(g) Would Defeat Limitations Congress Imposed On The Same Creditors In Section 1610(a)(7)

Petitioners' interpretation of Section 1610(g) is further flawed because it would render other portions of the FSIA "inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (citation omitted). In particular, it would render superfluous Congress's decision in Section 1610(a)(7) to allow creditors under the current version of the terrorism exception to execute only against property with a commercial nexus, because those same creditors could defeat that critical limitation simply by invoking subsection (g) instead of subsection (a).

1. Subsection (a)(7) provides that a foreign state's property is not immune from execution if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A"—that is, under the current version of the terrorism

exception—*and* the property is used in commercial activity in the United States. 28 U.S.C. 1610(a)(7). Under the court of appeals' interpretation, subsections (a)(7) and (g) work together to enable holders of judgments under the current terrorism exception to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or an agency or instrumentality, without need for a *Bancec* inquiry (via subsection (g)).

Petitioners' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling creditors under the current version of the terrorism exception to use subsection (g) to defeat subsection (a)(7)'s crucial limitation. Subsection (a)(7) allows a creditor under the current version of the terrorism exception to pursue property *only if it is used in commercial activity*—but petitioners would allow those same creditors to pursue property without that limitation simply by invoking a different subsection of Section 1610 (subsection (g) instead of (a)). Under petitioners' interpretation, subsection (g) would thus render subsection (a)(7)'s commercial-nexus requirement wholly superfluous for those creditors.

Petitioners have no answer. They merely note (Br. 41-44) that subsection (g) does not render superfluous Congress's reference in subsection (a)(7) to the *former* version of the terrorism exception as well. See 28 U.S.C. 1610(a)(7). But as set forth above, the problem is that petitioners' interpretation renders superfluous Congress's express imposition of a commercial-nexus requirement on individuals holding a judgment under the *current* version, Section 1605A. *Ibid.*

Indeed, petitioners' interpretation of subsection (g) would have made subsection (a)(7) entirely irrelevant

at the time Congress adopted those provisions. The same statute—the NDAA—amended subsection (a)(7) to refer to Section 1605A *and* added subsection (g). § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to the current version of the terrorism exception. *Id.* § 1083(b)(3)(A), 122 Stat. 341.[4] Thus, under petitioners' interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely superfluous—even though Congress made substantive changes to subsection (a)(7) at the very same time. But Congress does not usually "give with one hand what it takes away with the other." *Greenlaw* v. *United States*, 554 U.S. 237, 251 (2008).[5]

2. Some of petitioners' amici contend that subsection (a)(7)'s reference to the current version of the terrorism exception (Section 1605A) is not superfluous because, they assert, creditors who relied on Section 1605A to obtain jurisdiction but then invoked a state-

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[4] Congress later restored the reference in Section 1610(a)(7) to the former version of the terrorism exception. See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260.

[5] If subsection (g) applies when a judgment is entered against an agency or instrumentality, then petitioners' interpretation of subsection (g) would also cause the same superfluity problem for subsection (b)(3). That provision enables creditors under the current version of the terrorism exception to execute against the property of an agency or instrumentality that is engaged in commercial activity. 28 U.S.C. 1610(b)(3). Under petitioners' interpretation of subsection (g), however, a creditor of such a judgment against an agency or instrumentality could use subsection (g) to defeat subsection (b)(3)'s commercial-nexus requirement. This case provides no occasion for deciding whether or how subsection (g) applies in such a case, however, because the judgment here is against the foreign state itself.

law cause of action can use subsection (a)(7) for execution, but cannot use subsection (g). See Victims of Terrorism Amici Br. 24-25. Specifically, they contend that such a judgment is not "entered under Section 1605A," as required to invoke subsection (g). *Ibid.* (quoting 28 U.S.C. 1610(g)(1)). But that is incorrect. Section 1605A provides that a "court *shall hear a claim under this section*" if the requirements for jurisdiction are met, 28 U.S.C. 1605A(a)(2) (emphasis added), and jurisdiction does not depend on the source of the plaintiff's cause of action, 28 U.S.C. 1605A(a)(1). Accordingly, whenever a court has jurisdiction under Section 1605A and enters judgment, that judgment is "entered under section 1605A" and the plaintiff can invoke Section 1610(g). The source of the cause of action is irrelevant.

3. a. Petitioners contend (Br. 37-39) that the court of appeals' interpretation renders superfluous subsection (g)'s references to the "the property of a foreign state against which a judgment is entered under section 1605A" and to the "property of an agency or instrumentality of such a state." 28 U.S.C. 1610(g)(1). They argue that subsection (g) could instead consist solely of the "separate juridical entity" clause—*i.e.*, it could simply say that a creditor can execute against "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." *Ibid.* But Congress's clear purpose in enacting subsection (g) was to enable a creditor with a judgment against a foreign state under the current version of the terrorism exception to execute against property of (1) the state; (2) its agencies or instrumentalities; and (3) separate juridical entities owned by the state or its agencies or instrumen-

talities, if an exception elsewhere in Section 1610 provides for execution. The natural way to say that is to identify all three categories expressly.

Congress also had good reason to specify each category. First, subsection (g) specifies the state itself because that is how Congress identified the subset of cases in which subsection (g) permits veil piercing: When there is "property of a foreign state against which a judgment is entered under section 1605A." 28 U.S.C. 1610(g)(1). Without that limitation, subsection (g) would abrogate the *Bancec* inquiry in *all* cases, not merely terrorism cases. Second, Congress had obvious reason to specify that subsection (g) reaches agencies and instrumentalities: It was the decision in *Flatow* that prompted the proposal to override the *Bancec* inquiry in terrorism cases, and both *Flatow* and *Bancec* involved property of agencies or instrumentalities. See *Bancec*, 462 U.S. at 621; *Flatow*, 308 F.3d at 1071 & n.10. Third, Congress needed to include the "separate juridical entity" category in order to extend veil piercing to corporate subsidiaries of an agency or instrumentality (which are not ordinarily themselves agencies or instrumentalities, see *Dole Food*, 538 U.S. at 473-478), and corporate subsidiaries of the state itself that do not qualify as agencies or instrumentalities (which occurs if the subsidiary is a citizen of the United States or a third country, see 28 U.S.C. 1603(b)(3)). Subsection (g) is thus a comprehensive veil-piercing provision.

Petitioners contend (Br. 38) that the "agencies or instrumentalities" category is unnecessary because the "separate juridical entity" category would cover agencies and instrumentalities whenever they are separate juridical entities, and because veil piercing is unnecessary when the entity is *not* such a separate entity. But

under the FSIA's definition, an agency or instrumentality must be a "separate legal person, corporate or otherwise." 28 U.S.C. 1603(b)(1). The second category in subsection (g) clearly refers to an "agency or instrumentality" as so defined. And it is unlikely that Congress would enact subsection (g) without expressly saying that it reaches both the state and its agencies and instrumentalities specifically, when the primary purpose of subsection (g) is to reach both the state and its agencies and instrumentalities. The third category then expands veil piercing still further by covering certain entities that do not satisfy the definition of "agency or instrumentality." That structure is sensible, not superfluous.

b. Petitioners also contend (Br. 32) that the *Bancec* factors listed in subsection (g) "cannot be reconciled with a requirement that the property being attached must be used by the foreign state judgment debtor for commercial activities." But that argument fundamentally misperceives how subsection (g) works. When subsection (g) pierces the veil and causes the property of an agency or instrumentality to be treated as the state's property for purposes of execution, the proper inquiry under subsection (a)(7) is not to ask whether the property is used for commercial activity by the *state*. Rather, the question is whether it is used for commercial activity by *that agency or instrumentality*.

Given Congress's purpose of making it easier for victims of terrorism to pierce the veil, Congress sensibly directed courts that they may proceed "regardless of" factors they otherwise would have considered. *E.g.*, 28 U.S.C. 1610(g)(1)(C) (instructing courts not to consider "the degree to which officials of that government

manage the property or otherwise control its daily affairs"). There is nothing incongruous about using one inquiry in subsection (g) and another in subsection (a), as they are asking different questions for different reasons.[6]

D. Petitioners' Reliance On The Statutory Purpose And Legislative History Is Misplaced

It is undisputed that Congress intended for subsection (g) to "expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism." *Bennett*, 825 F.3d at 961. But that general purpose does not help resolve the question presented here, because both competing interpretations advance that purpose: The court of appeals' interpretation "expand[s] successful plaintiffs' options for collecting [such] judgments," *ibid.*, by making it easier to pierce the veil.

The question presented here is *how far* Congress went in advancing that purpose, and in particular whether Congress intended (1) to provide for veil piercing *and* (2) to make property subject to execution regardless of the other requirements of Section 1610. As set forth above, Section 1610(g)'s text and context unambiguously establish that Congress took the first step but not the second: It made property of different entities subject to execution "regardless of" the *Bancec* factors, but only "as provided in th[at] section." 28 U.S.C. 1610(g)(1). Because the text is clear, "reliance on legislative history is unnecessary." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 458 (2012) (citation omitted).

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[6] Petitioners are wrong to assert (Br. 44-45) that blocked property "cannot be 'used' by the foreign state or its agencies" within the meaning of subsection (a)(7). Blocked assets could have been used in commercial activity until they were blocked.

In any event, the legislative history does not support petitioners. Just as the text of subsection (g) is focused on a single topic—veil piercing—the legislative history of subsection (g) is focused on that one topic as well. *E.g.*, H.R. Conf. Rep. No. 447, 110th Cong., 1st Sess. 1001-1002 (2007) (Conf. Rep.) (discussing veil piercing and protections for third-party joint property holders); 154 Cong. Rec. at 500 (statement of Sen. Lautenberg) (explaining that the bill would remedy "misapplication of the 'Bancec doctrine'"); *ibid.* (giving *Flatow* as an example of such misapplication); 151 Cong. Rec. 12,869 (2005) (statement of Sen. Specter) (it would "chang[e] the legal standard of the Bancec doctrine"). There is no similar indication in the legislative history that Congress even considered allowing execution without regard to a commercial nexus or the other limitations in Section 1610, notwithstanding that dispensing with all such limitations would be a very different—and more dramatic—step.

Petitioners primarily rely (Br. 57) on a statement in the Conference Report that subsection (g) would "permit[] any property in which the foreign state has a beneficial ownership to be subject to execution of [a] judgment." Conf. Rep. at 1001. But the lone word "any" cannot bear the weight petitioners place upon it. That Report does not even mention the commercial-activity requirement or other limitations on execution under Section 1610, much less say that subsection (g) would override them. Indeed, petitioners acknowledge that "any" is an overstatement that must be qualified: Petitioners agree (Br. 17; Pet. 13) that subsection (g) does not circumvent the FSIA's prohibitions against executing upon central bank, diplomatic, or consular property. See 28 U.S.C. 1609, 1611(b); Vienna Convention on

Diplomatic Relations, Art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Imprecise language in one passage of the legislative history provides no sound basis for concluding that subsection (g)'s reach is limited by Sections 1609 and 1611—yet not by anything in Section 1610—when subsection (g) is expressly tied to what is "provided in" Section 1610. 28 U.S.C. 1610(g)(1); cf. *Milner* v. *Department of Navy*, 562 U.S. 562, 572 (2011) (refusing to "allow[] ambiguous legislative history to muddy clear statutory language").

At bottom, petitioners' argument boils down to the position that their interpretation would be more favorable to victims of terrorism. But "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And this Court's function is "to give [a] statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010); *e.g.*, *Mohamed*, 566 U.S. at 461 ("Congress has seen fit to proceed in more modest steps."); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 383 (2009) (rejecting an interpretation of TRIA that would have been more favorable to a victim of Iranian terrorism; stating that "Congress had a more complicated set of purposes in mind").

Here, Congress enacted Section 1610's limitations on execution for good reason. The "judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may . . . affect our relations with it." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945)). Indeed, "at the time the FSIA

was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002); see *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14, 22 (1973) (statement of Acting Legal Adviser Brower), Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998). The FSIA's exceptions to execution immunity in turn are "narrower" than its exceptions to jurisdictional immunity. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

Even in the context of actions against state sponsors of terrorism, execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States' own property abroad. Execution could also lead to the diversion of assets that might otherwise be used to serve critical United States foreign policy objectives, such as when a formerly terrorist country has undergone a regime change. For example, President George W. Bush initially vetoed the NDAA because of concern that its execution provisions "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 853-854 (2009) (citation omitted). Congress then added a provision allowing the President to waive the relevant provisions as to Iraq, which the President did immediately upon signing the bill into law. *Ibid.*

Section 1610's limitations on execution exist to protect against these kinds of potentially adverse foreign-

policy repercussions. For example, Section 1610(a) limits execution to property that is used for commercial activity in the United States. 28 U.S.C. 1610(a). That exception reflects the idea that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty" and embroiling the United States in a foreign relations conflict "than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-704 (1976) (plurality opinion). And although subsection (f) is not limited to commercial property, Congress limited it to property that is blocked or otherwise regulated under certain sanctions programs—and Congress made execution subject to Presidential waiver. See 28 U.S.C. 1610(f)(3). Congress thus ensured that the Executive can eliminate or fine-tune execution in light of foreign policy concerns. The President has done just that, waiving subsection (f) on the ground that it "would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions." 65 Fed. Reg. at 66,483.

The property at issue here consists of ancient Persian artifacts, documenting a unique aspect of Iran's cultural heritage, that were lent to a U.S. institution in the 1930s for academic study. Iran has never used the Collection for commercial activity in the United States; the Collection is not blocked; and it is not subject to execution under subsection (f). Execution against such unique cultural artifacts could cause affront and reciprocity problems that are different in kind from execution under any other provision of Section 1610.

If Congress were going to take the step of enabling execution even against property that is *not* commercial, *not* blocked, and *not* otherwise subject to execution under Section 1610, one would expect Congress to have said so expressly after squarely considering the ramifications of that decision. Congress did neither. Subsection (g) subjects additional property to execution only "as provided in th[at] section." 28 U.S.C. 1610(g)(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1330 provides:

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

2. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

4. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

5. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

6. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem

whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies

would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—

(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) EXCEPTIONS.—

(A) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) OTHER CULTURALLY SIGNIFICANT WORKS.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in

which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

7. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign

state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

8. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

9. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

10. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of

the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

11. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

12. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the

Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

13. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank,

authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

RECORD AND BRIEFS

No. 16-534

In the Supreme Court of the United States

JENNY RUBIN, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF FORMER U.S. COUNTERTERRORISM OFFICIALS, NATIONAL SECURITY OFFICIALS, AND NATIONAL SECURITY SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Interest of Amici Curiae 1

Summary of the Argument 2

Argument 6

I. Interpreting subsection 1610(g) to allow attachment of all assets of terror-sponsoring nations respects Congress's consistent approach to combatting state terror finance 6

A. Congress utilizes administrative sanctions and criminal liability to dismantle foreign-sovereign terrorist funding networks. 7

B. Congress also empowers private parties to disrupt state-sponsored terror through massive civil judgments. 13

C. As an integral part of this comprehensive federal antiterrorism scheme, subsection 1610(g) allows attachment against all assets in which terror-sponsoring nations have a beneficial interest 18

1. Only a broad reading of subsection 1610(g) can be squared with Congress's consistent approach elsewhere in anti-terrorism law. 19

2. Subsection 1610(g) does more than merely override *Bancec*'s distinctions between a foreign government and its instrumentalities 22

3. Subsection 1610(g)'s requirement that attachments proceed "as provided in this section" incorporates only the procedural requirements located elsewhere in Section 1610 23

4. Any redundancy in Section 1610's terrorism exceptions is no vice, and forces no narrower reading of subsection 1610(g). 25

II. The unfettered ability of plaintiffs to hold foreign sovereigns accountable through civil attachment is vital in the fight against terror. 29

A. Civil litigation is a key weapon in the war on terror. 30

B. Civil suits targeting foreign sovereigns are especially effective in deterring terror financing. 31

Conclusion 34

Appendix i

TABLE OF AUTHORITIES

Cases

Bank Markasi v. *Peterson*,
136 S. Ct. 1310 (2016) 29, 33

Cicippio v. *Islamic Republic of Iran*,
30 F.3d 164 (D.C. Cir. 1994) 15

Dames & Moore v. *Regan*,
453 U.S. 654 (1981) 9

First National City Bank v. *Banco Para El Comercio Exterior de Cuba*,
462 U.S. 611 (1983) (*Bancec*). 19, 21, 22, 23

Flatow v. *Islamic Republic of Iran*,
999 F. Supp. 1 (D.D.C. 1998) 15

Haim v. *Islamic Republic of Iran*,
425 F. Supp. 2d 56 (D.D.C. 2006) 16

King v. *Burwell*,
135 S. Ct. 2480 (2015) (Scalia, J., dissenting), ... 26

Leibovitch v. *Islamic Republic of Iran*,
697 F.3d 561 (7th Cir. 2012) 16

Owens v. *BNP Paribas S.A.*,
--- F. Supp. 3d --, 2017 WL 394483 (D.D.C. Jan. 27, 2017) 12

Peterson v. *Islamic Republic of Iran*,
264 F. Supp. 2d 46 (D.D.C. 2003) 33

Propper v. *Clark*,
337 U.S. 472 (1949) 9

Samantar v. *Yousuf*,
560 U.S. 305 (2010) 14

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 14

Smith v. *Socialist People's Libyan Arab Jamahiriya*,
886 F. Supp. 306 (E.D.N.Y. 1995). 15

Yates v. *United States*,
135 S. Ct. 1074 (2015) (Kagan, J., dissenting), ... 26

Statutes

18 U.S.C.

§ 2333 13

§ 2333(a) & (d)(2). 13

§ 2339A(a) 12

§ 2339A(b)(1) 12

§ 2337(2). 14

§ 2339B(d), ... 11

§ 2339B(g)(4) 12

22 U.S.C.

§ 1882 1

28 U.S.C.

§ 1350 1

§ 1602. 14

§ 1605(a)(7) 15

§ 1605A 15, 18, 29

§ 1605A 16

§ 1605A(a). 14

§ 1605(a)(5) 16

§ 1605A(c). 14

§ 1605A(a)(1) 15

§ 1605A(a)(2)(A)(i)(I) 29
§ 1605B(b) 16
§ 1605B(a) 14
§ 1605B(c) 14
§ 1606 15
§ 1609 18
§ 1610 ..... *passim*
§ 1610(a) 17, 23, 24, 25, 26
§ 1610(a)(4)(B), ... 18
§ 1610(a)(7) 25, 26
§ 1610(a)-(e) 20
§ 1610 note (b)(1) 17
§ 1610(b) 17, 23, 25, 26, 27
§ 1610(b)(1)-(b)(3) 27
§ 1610(b)(3) 25, 26, 27
§ 1610(f) 17
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§ 1610(f)(2)(A) 24
§ 1610(f)(3) 17, 19, 25
§ 1610(g) ..... *passim*
§ 1610(g)(2) 19, 25
§ 1610(g)(3) 19
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INTEREST OF AMICI CURIAE[1]

Amici are national security scholars and former U.S. officials who held senior positions in the federal government concerned with counterterrorism, diplomacy, and national security. Amici have spent substantial portions of their careers developing, interpreting, and enforcing this country's framework of federal laws designed to prevent heinous acts of terrorism. Amici's experience confirms that successfully starving terrorist organizations of funding is a sure way to save American lives. Amici also understand that private lawsuits must be an integral component of any effective strategy to keep money out of terrorists' hands.

Amici have previously participated in cases where the efficacy of private civil lawsuits as weapons for combatting terror was threatened. *Kiobel* v. *Royal Dutch Petrol. Co.*, No. 10-1491 (advocating the view that the Alien Tort Statute, 28 U.S.C. § 1350, allows claims against corporations for violations of international law); *Jesner* v. *Arab Bank PLC*, No. 16-499 (same); *Bank Markazi* v. *Peterson*, No. 14-770 (advocating successfully in support of the constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1258, which allows for execution of funds held by the Central Bank of Iran to satisfy certain terrorism-related judgments against the Islamic Republic of Iran, 22 U.S.C. § 1882).

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[1] All parties lodged blanket amicus consent letters with the court. No counsel for any party authored this brief in whole or in part, and no entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

This case concerns a concerted effort to undermine one of the most effective civil terror-fighting tools: private lawsuits brought directly against designated state sponsors of terror like the Islamic Republic of Iran. Many of the dollars flowing into terrorists' pockets come from a select few countries. And even among these brutal states, Respondent the Islamic Republic Iran stands out as the most notorious—utilizing "terrorism as one of the regime's signature calling cards." *Joint Hr'g, House Homeland Security Subcomm. on Counterterrorism and Intelligence and Subcomm. on Oversight, Investigations, and Management, Iranian Terror Operations on American Soil*, 112th Cong. 1 (Oct. 26, 2011), <http://bit.ly/2j9e25p> (testimony of Prof. Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence). The enforcement of private judgments against such terror-supporting regimes can be critical in holding them accountable for their crimes, deterring them from taking part in the barbaric enterprise of terrorism, and providing justice for their victims. But the result below would thwart many such enforcement efforts, shielding assets that Iran and other state sponsors of terror hold in the United States. That would sap private lawsuits of much of their power against these rogue regimes.

Biographical information for each signatory to this brief is provided in the appendix.

SUMMARY OF THE ARGUMENT

Money is the lifeblood of terrorism. It provides not only the weapons and explosives needed to conduct terror operations, but also sustains the larger apparatus that every international terrorism enterprise needs, from the "compensation" provided to operatives and their families, to more mundane costs of paying employees and printing

propaganda materials. Starving terror networks of the funding needed to maintain these criminal enterprises has been a signature focus of Congress's antiterrorism efforts. Because an outsized portion of that funding comes from a select few countries, these countries have become targets of the highest priority in that effort.

Over the past four decades, Congress has developed a comprehensive set of antiterrorism laws that aim to completely dismantle these countries' terror funding capabilities. It has empowered Executive Branch officials to impose crippling administrative sanctions that have frozen their assets, stifled their commerce with other nations, sapped their key industries of investment, and even halted trade in their native currencies. Congress has also attacked the web of agencies, instrumentalities, affiliated organizations, and private bank accounts these countries use to distribute money to terror organizations.

Congress has also joined terror victims to the cause, enlisting their unique capacity to exert financial pressure on state sponsors of terror through civil lawsuits. And to ensure the potency of this financial pressure, Congress has created a different system of immunity rules for terrorism sponsors than the one enjoyed by their law-respecting peers. The latter generally enjoy immunity from both judgment and attachment, except when they engage in certain commercial activities. But for terrorism-sponsoring states, Congress has gradually stripped immunity from judgment—at first only for certain habitual offenders designated by the Executive, but now for all who support terrorist acts in the U.S. Congress has also acted repeatedly to strip designated sponsors of terror of attachment immunity.

Throughout the development of this robust and comprehensive anti-terror strategy—composed in equal parts of administrative sanctions, civil and criminal penalties, and private lawsuits—Congress has aimed to deny these nations of every dollar they might use to fund terrorism, in hopes of inhibiting their destructive capacity over the short term, and, over the longer term, raising the cost of terror sponsorship to the point that it is no longer a strategy worth pursuing. Congress has also worked to remove any artificial legal barriers standing in the way of these goals, to ensure that the only obstacles—public or private—to completely halting state sponsorship of terror are the necessarily finite resources available to combat it, and the practical difficulty of uncovering it.

Congress completed that project with the enactment of 28 U.S.C. § 1610(g), which plainly provides that *virtually all* property in which a terror-sponsoring state has a beneficial interest can be reached to satisfy judgments for terror-related injuries, except for certain limited categories of assets the U.S. has elected to protect under other laws in service of other national and international priorities. That development brought Congress's approach to civil immunity in FSIA into line with the remainder of its comprehensive antiterrorism strategy, which gives no quarter to terror-sponsoring states to ensure that they are deprived of any property that might be used to finance terror.

Respondents and the Government resist this natural reading of subsection 1610(g). But their insupportably narrow interpretation cannot be squared with that provision's plain text, or with the comprehensive antiterrorism strategy Congress has followed elsewhere in the law. In

their hands, subsection 1610(g)'s scope would be constricted, so that it would do no more than tinker with certain particulars for disregarding the corporate formalities between designated terror-sponsoring countries and their agencies and instrumentalities. Under this view of the statute, terrorism sponsors' property would otherwise remain shielded from attachment and execution on virtually the same terms as property belonging to their law-respecting neighbors. That would permit rogue nations to escape responsibility for sponsoring heinous acts of terror causing catastrophic harms to Americans. It would also erect a shield around assets these countries maintain in this country, ensuring their availability to finance terrorist activities, both on U.S. soil and abroad—thereby *facilitating*, rather than impairing, these countries' capacities to commit future acts of terror against American citizens.

Nothing suggests that Congress would permit subsection 1610(g) to be employed to such unjust ends. And by advocating this position, the Government reveals that it prioritizes its institutional desire for flexibility in foreign relations above faithfulness to Congress's consistent antiterrorism objectives, and the protection of innocent lives. Indeed, the Government now finds itself aligned with a designated sponsor of terror against its American victims. Rejecting the interpretation that it and Respondents offer for subsection 1610(g) is necessary to remain true to FSIA's text and history, and to give due respect to the consistent framework Congress has developed across the entire body of federal antiterrorism law.

Rejecting the interpretation of subsection 1610(g) offered by Iran and the Government is also essential to preserving the coercive force of civil judgments against for-

eign sovereigns as an essential tool in the fight against terror. Civil litigation has been demonstrably effective in curbing the financing of terrorism. And when directed at state sponsors of terror, such suits provide the avenue of attack with perhaps the greatest potential for success in putting a dent in terror funding, given the sheer amount of money provided by states to terrorists, and the greater likelihood that states will respond to the coercive incentives from massive civil judgments when compared to other terrorist funding sources. These incentives are practically undone, however, when terror-sponsoring nations like Iran are permitted to shield their assets from recovery behind artificial barriers, and thereby limit realistic prospects of collecting the judgment. Without these incentives, rogue nations will be encouraged to kill Americans with impunity, terror victims will be denied justice after decades of litigation. And the next generation of potential private terrorism fighters, upon witnessing the pyrrhic victories of their predecessors, may remain on the sidelines rather than taking up the fight.

ARGUMENT

I. Interpreting subsection 1610(g) to allow attachment of all assets of terror-sponsoring nations respects Congress's consistent approach to combatting state terror finance.

Subsection 1610(g) cannot be understood in isolation, but must be interpreted as part of the larger legal antiterrorism framework in which it operates. This robust, comprehensive body of law evinces Congress's absolutist purpose to prevent rogue nations from sponsoring terror operations, utilizing every economic tool at its disposal, including administrative sanctions, civil and criminal penalties, and private lawsuits. Congress has also stripped

these criminal states of the immunities the U.S. extends to law-respecting nations, lest those immunities be abused to shield them from responsibility for harming Americans. As subsection 1610(g) is an integral part of this larger body of antiterrorism law, it should be understood to have the same absolutist purpose, and the same broad, immunity-stripping reach.

A. Congress utilizes administrative sanctions and criminal liability to dismantle foreign-sovereign terrorist funding networks.

While "[t]errorists seldom kill for money *** they always need money to kill." Jimmy Gurulé, *Unfunding Terror: the Legal Response to the Financing of Global Terrorism* 21 (2008) (*Unfunding Terror*). Direct terrorist operations themselves are relatively inexpensive, often costing only tens of thousands of dollars, but the larger terrorist enterprises necessary to support these operations require much greater sums of money to function. Financial Action Task Force, *Terrorist Financing* 7 (2008) <http://bit.ly/2xfrtXB>; *Unfunding Terror* 3. In the lead-up to the September 11, 2001 attacks for example, al Qaeda spent approximately $30 million a year. John Roth et al., Nat'l Comm'n on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing: Staff Report to the Commission* 19–30 (2004).

Much of the money that funds these activities comes from foreign sovereigns. Iran in particular is considered "the foremost state sponsor of terrorism" in the world, U.S. Dep't of State, *Country Reports on Terrorism 2016* (*2016 Country Report*), <http://bit.ly/2uzXW9m>,

providing "a range of support, including financial, training, and equipment, to groups around the world," U.S. Dep't of State, *Country Reports on Terrorism 2015* 284-585 (2015), <http://bit.ly/2qoqWz7>. The U.S. Department of Defense estimates that Iran provides between $100–200 million per year in funding to Hezbollah, its primary terrorist proxy. U.S. Dep't of Def., *Unclassified Annual Report on Military Power of Iran* 8 (2010), <http://bit.ly/2vJQsOu>. Iran has also provided tens of millions of dollars to Hamas and other terrorist groups such as al-Sabirin, Palestinian Islamic Jihad, and the Popular Front for the Liberation of Palestine General Command. *Id.* at 2; Matthew Levitt, *Iran's Support for Terrorism Under the JCPOA* Wash. Inst. Policywatch 2648 (July 8, 2016).

Given the sheer magnitude of terror funding these nations provide, every Congress for the past three decades has understandably made state sponsors of terror a central target of its antiterrorism efforts. At every turn, Congress has attacked these countries' financial resources, knowing that inhibiting the terror-financing capacities of even one of these countries would deal a major blow to global terrorist-financing networks.

1. The centerpiece of Congress's efforts to curb state-terror sponsors' destructive capabilities has long been its measures to authorize economic sanctions. Since World War I, Congress has authorized the President in times of war to seize property in which a foreign enemy state has an interest under the Trading with the Enemy Act (TWEA), ch. 106, 40 Stat. 422 (50 U.S.C. 1701 *et seq.*).

Over the past four decades, Congress has adapted this wartime sanctioning power to the fight against terrorism. First, in the International Emergency Economic Powers

Act (IEEPA), Pub. L. No. 95-223, §§ 202, 203, 91 Stat. 1627 (codified at 50 U.S.C. §§ 1701 *et seq.*), Congress lifted the requirement that formal war be declared before the President's seizure powers are triggered. IEEPA instead permits the President to unilaterally invoke this seizure power by declaring a national emergency whenever "the U.S. national security, foreign policy, or economy" are threatened by foreign interests. 50 U.S.C. §§ 1701, 1702. Congress expanded this sanctioning authority again with Section 106 of the USA PATRIOT Act, which amended IEEPA to allow the President to temporarily hold property while it decides whether that property or its owner is connected to the emergency and should be permanently seized. See Pub. L. No. 107-56, tit. I, § 106, 115 Stat 277 (codified at 50 U.S.C. § 1702(a)(1)(C)).

Five consecutive presidents have employed these Congressionally conferred powers to take control of terror-sponsoring nations' assets, block transactions in those assets, allow attachment and execution, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 474–476 (1949), vest title in the United States, *ibid.*, and transfer funds directly to U.S. citizens to satisfy claims against the foreign states, see *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). And these presidents have treated every asset in possession of these nations as fair game, not simply those are used in commerce.

The political branches have employed such blocking sanctions against Iran several times since the Iranian Revolution and the Iranian Hostage Crisis. This was first done by President Carter in 1979, Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979), and was most recently done by President Obama in February 2012, Exec. Order No. 13,599, 77 Fed. Reg. 6,659. Congress has also directed the President to use blocked property belonging to Cuba

and Iran to make payments to certain individuals with terrorism-related judgments against those states. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, Div. C, § 2002, 114 Stat. 1541.

Acting under authority granted by Congress, Presidents have also employed a range of other sanctions beyond blocking actions—most of which have also been directed at Iran. Presidents have banned travel to terror-supporting nations, Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (Apr. 17, 1980); and issued trade embargos preventing imports and exports, Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980); Exec. Order No. 12,613, 52 Fed. Reg. 41,490 (Oct. 28, 1987); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995); Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005).

The political branches have also prohibited investment in specific sectors of terror-sponsoring countries' private economies. *See* Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 15, 1995) (prohibiting U.S. investment in Iran's energy sector); Exec. Order 13,590, 76 Fed. Reg. 72,609 (Nov. 20, 2011) (restricting sales to Iran of equipment and services related to Iran's oil industry); Exec. Order 13,645, 78 Fed. Reg. 33,945 (June 3, 2013) (imposing sanctions on financial institutions that engage in the Iranian automobile industry). Presidents have even restricted financial transactions with companies located in terror-sponsoring nations, Exec. Order No. 13,622, 77 Fed. Reg. 45,897 (July 30, 2012), and have prohibited trade in those nation's currencies, see Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013). And indeed, in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Congress went so far as to make it a crime to engage in *any* financial transaction with the governments

of designated supporters of international terrorism. Pub. L. No. 104-132, tit. III, § 321(a), 110 Stat. 1254 (18 U.S.C. § 2332d(a)).

None of these efforts was limited to property that these countries had placed into commerce themselves. On the contrary, many of them sought to seize property belonging to these nations' *private* citizens, and sought to disrupt these nations' *private* commerce, trade, and economic development. And these measures were all designed to work together to cripple these rogue nations' economies, so to maximize the potential for these economic pressures to disrupt their terror-funding capacities.

2. In addition to these crippling sanctions against terror-sponsoring nations—which target the flow of funds going *in* to these countries, and the assets in their possession—Congress has also targeted the flow of money going *out* of these countries, to dismantle their sprawling terror-financing operations. Congress has attacked the links between these countries and the terrorist organizations they sponsor, with unsparing laws targeting their agents, instrumentalities, and affiliates.

In AEDPA, Congress made it a crime for anyone to provide material support to organizations designated by the Executive to be sponsors of terror, 18 U.S.C. § 2339B(d), on the theory that these designated organizations are "so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA, § 301(a)(7), 110 Stat. 1247 (18 U.S.C. § 2339B note). In AEDPA, Congress included an expansive list of contributions that would constitute "material support," 18 U.S.C. § 2339B(g)(4) (incorporating the list in 18

U.S.C. § 2339A(a) & (b)(1)), with no hint that the list was limited to property used in international commerce.

Congress, in the Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197. Tit. II, § 202(a), 116 Stat. 724 (codified at 18 U.S.C. § 2339C), also made it a crime to "provide[]" or "collect[]" funds for terrorist activities, which disrupts the network of bank accounts through which much of these nations' terror funding flows. *E.g.*, *Owens* v. *BNP Paribas S.A.*, --- F. Supp. 3d ---, 2017 WL 394483 (D.D.C. Jan. 27, 2017) (alleging that banks processed transactions from Sudan going to a terrorist group).

Congress has also authorized the Executive Branch to block the assets of private individuals and terrorist-supporting groups that might be affiliated with terror-sponsoring nations—including partnerships, associations, corporations, and other organizations—on even broader terms than permitted against the foreign sovereigns themselves. Shortly after the September 11, 2011 terrorist attacks, President Bush entered Executive Order 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), which ordered the seizure of "all property" belonging to such individuals and groups that "pose a significant risk of committing *** acts of terrorism," to the full extent permitted by IEEPA. In the USA PATRIOT ACT, 18 U.S.C. § 981(k), Congress went beyond our borders, permitting forfeiture of funds even when located in offshore accounts of foreign banks. The political branches have extended the reach of their power to block terrorist funds *still further* by participating in international efforts to freeze assets of international terrorist organizations under the International Convention for the Suppression of the Financing of Terrorism,

Dec. 9, 1999, art. 8, 2178 U.N.T.S. 229. None of these actions provided exemptions for those associated with foreign sovereigns, or the sovereigns themselves, and none exempted property that was kept out of international commerce. Taken together, these measures evince Congress's intent to do everything in its power to deprive terror-funding nations, their agencies, and their instrumentalities of every dollar that might be used to finance terror.

B. Congress also empowers private parties to disrupt state-sponsored terror through massive civil judgments.

1. Congress has also long recognized that civil tort actions "provide an invaluable supplement to the criminal justice process and administrative blocking orders." *Unfunding Terror* 324. Congress first enlisted private plaintiffs to help combat terror back in 1992, in the Anti-Terrorism Act, Pub. L. No. 102-572, tit. X, § 1003(a)(4), 106 Stat. 4506, 4522, which conveys to terror victims a direct civil remedy against those who provide "substantial assistance" to designated terror organizations involved in a terrorist attack. 18 U.S.C. § 2333(a) & (d)(2). This measure was designed both to ensure justice for terror victims, and also to "put[] terrorists' assets at risk" and "raise the cost of doing business for these outlaw organizations." *Antiterrorism Act of 1991: Hr'g before the H. Subcomm. on Intellectual Prop. and Judicial Admin.*, 102nd Cong., 2d Sess. 13 (1992); see also S. Rep. 102-342, at 22 (1992) ("[T]he imposition of liability at any point along the causal chain of terrorism" would "interrupt, or at least imperil, the flow of money."). Notably absent from Section 2333's civil remedy is any restriction on the types of assets available to enforce a civil terrorism judgment rendered under its provisions.

Originally, direct suits against "foreign state[s]" were not included among the ATA's civil remedies. 18 U.S.C. § 2337(2). But motivated by a purpose to "both deter and redress specific attacks," and "prompt sovereigns to disentangle their operations from terrorist networks," *Hr'g before the H. Subcomm. on the Constitution and Civil Justice on H.R. 2040*, 114th Cong., 2d Sess. 43 (July 14, 2016) (H.R. 2040 Hr'g), Congress later added mechanisms for direct recovery against states. National Defense Appropriations Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338; Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 3, 130 Stat. 852, 853. Under these provisions, terror victims can maintain direct causes of action against states whether they are officially designated by the Executive as sponsors of terror, 28 U.S.C. § 1605A(a) & (c), or not, *id.* § 1605B (a) & (c).

2. Congress has likewise repeatedly acted to deny terror-sponsoring states the immunities the U.S. extends to other nations under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.* As originally enacted, FSIA "codif[ied] the restrictive theory of sovereign immunity," *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010), recognized [u]nder international law," by which foreign states' immunity from jurisdiction is lifted only "insofar as their commercial activities are concerned," and only their "commercial property may be levied upon for the satisfaction of judgments," 28 U.S.C. § 1602.

Terror-sponsoring states were originally able to shield themselves from liability for terrorism-related injuries under the generous umbrella of FSIA's restrictive immunity. *E.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993); *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir.

1994); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995). Recognizing this failure in FSIA, Congress determined it necessary to craft a different immunity regime for foreign states that engage in terror-sponsorship: "sovereign acts which are repugnant to the United States and the international community," *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998), and "an internationally recognized wrong." H.R. Rep. No. 103-702, at 5 (1994).

In order to "give American citizens an important economic and financial weapon against" the "outlaw states" that sponsor terrorism, H.R. Rep. No. 104-383, 137–38 (1995), Congress in AEDPA added a new "terrorism exception" to FSIA codified at subsection 1605(a)(7) (since relocated to Section 1605A), which would "allow[] suits in the federal courts against countries responsible for terrorist acts." *Ibid.* This new exception carves out states designated by the Department of State as state sponsors of terrorism, and strips them of any jurisdictional immunity in any case brought against them by U.S. nationals for claims based on the state's terrorist acts or material support of terrorism. See 28 U.S.C. § 1605A(a)(1).

Congress then went further to strip terror-sponsoring nations of immunity so that their funding of terror might be halted. Congress amended FSIA to allow punitive damages to be imposed against terror-sponsoring nations, which are not allowed against other foreign sovereigns. 28 U.S.C. § 1606. It first provided for recovery of punitive damages under the Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (codified at 28 U.S.C. § 1605 note). But some courts interpreted this provision narrowly, to permit punitive damages only against the

agents and instrumentalities of foreign sovereigns. *Haim* v. *Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 n.2 (D.D.C. 2006) (collecting cases). Congress legislatively overturned those decisions in Section 1083 of the NDAA, codified at 28 U.S.C. § 1605A(c), which explicitly authorizes recovery of punitive damages against foreign states themselves. In doing so, Congress recognized that "the only way to achieve the goal of altering state conduct 'was to impose massive civil liability on foreign state sponsors of terrorism whose conduct results in the death or personal injury of United States citizens.'" *Leibovitch* v. *Islamic Republic of Iran*, 697 F.3d 561, 565–566 (7th Cir. 2012) (quoting Congressman Jim Saxon, Chairman of the House Task Force on Counterterrorism and Unconventional Warfare).

And just last year in JASTA, Congress created an entirely new avenue "to deter" state sponsors of terrorism "and remedy acts of terrorism" by stripping them of immunity. H.R. 2040 Hr'g at 43. JASTA amended FSIA's "non-commercial tort" exception in subsection 1605(a)(5) to strip foreign states of immunity for any claims "in which money damages are sought against a foreign state for personal injury or death" caused by "the tortious act or omission of that foreign state" on U.S. soil. 28 U.S.C. § 1605B(b). JASTA's terrorism exception now stands alongside AEDPA's original terrorism exception. And JASTA's new terrorism exception is considerably broader, because it enables suits against states that have not been "designated as a state sponsor of terrorism," as required to meet 1605A's exception.

Beyond these efforts to strip jurisdictional immunity from state sponsors of terror, Congress also acted to strip

terror-sponsoring nations of the immunity from attachment enjoyed by law-respecting nations—efforts that culminated in the enactment of subsection 1610(g).

When Congress first enacted AEDPA's terrorism exception, it made only minor modifications to the attachment shield. While it allowed attachment against designated state sponsors of terror, their agencies, and instrumentalities, AEDPA § 221(b), 110 Stat. 1214, 1242–1243, it permitted the property to be attached to satisfy a terrorism judgment only when "used for a commercial activity in the United States." 28 U.S.C. §§ 1610(a), 1610(b).

Congress moved swiftly to change that rule, however. Two years later, in 1998, Congress amended FSIA to add subsection 1610(f). Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. A, tit. I § 117, 112 Stat. 2681, 2681-491. This subsection provides that any property of a terrorist state, including that held by its agencies and instrumentalities, which has been frozen pursuant to TWEA or IEEPA is subject to execution or attachment of a judgment against that state. See also Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note). The President can waive this right of attachment "in the interest of national security" 28 U.S.C. § 1610(f)(3), and in some instances on an asset-by-asset basis, *id.* § 1610 note (b)(1).

These provisions still make it *possible* to completely remove attachment immunity for most assets in which a foreign sovereign possesses a beneficial interest. And it sets terror-sponsoring nations apart, making attachment of their assets possible under circumstances that would not be permitted against law-abiding nations. The only

assets that still lie beyond reach under subsection 1610(f)(1)(A) are those protected from attachment under other laws, such as assets the U.S. is obliged to protect by treaty, 28 U.S.C. § 1609, and consular, *id.* § 1610(a)(4)(B), central bank, *id.* § 1611(b)(1), or military property, *id.* § 1611(b)(2) of the foreign sovereign.

These original inroads against terror sponsors' attachment immunity had flaws, however. They did not categorically exempt assets from FSIA's restrictions on attachment immunity, but instead left it to the Executive Branch to determine whether the assets should be blocked, and attachment should be allowed. Terrorism-sponsoring states would still enjoy at least "restrictive immunity" from attachment so long as their assets had not been blocked or Congress had not specifically directed that the assets be available for attachment.

C. As an integral part of this comprehensive federal antiterrorism scheme, subsection 1610(g) allows attachment against all assets in which terror-sponsoring nations have a beneficial interest

Congress's enactment of FSIA's subsection 1610(g), in Section 1083 of the NDAA, was the next step in this decades-long legislative effort to deprive terrorists of funding, where it finally removed *all* barriers standing in the way of terror victims seeking to attach and execute upon assets belonging to terror-sponsoring sovereigns. In subsection 1610(g), Congress permits "the property of a foreign state against which a judgment is entered under section 1605A" to be attached or executed upon, without listing any restrictions on the types of assets that could be reached. And it goes further, to allow recovery of "the

property of an agency or instrumentality of such a state, including property that is a separate juridical entity" to satisfy a terrorism judgment against the sovereign principal. Subsection 1610(g) thus permits attachment or execution upon *all* property in which the state has a beneficial interest, save for consular, central bank, and military property that the U.S. is elsewhere obliged by law or by treaty to protect from attachment.

1. Only a broad reading of subsection 1610(g) can be squared with Congress's consistent approach elsewhere in anti-terrorism law

Subsection 1610(g) makes clear that attachments conducted under its provisions are subject only to the specific rules listed within that subsection itself, and these override the larger body of restrictions on attachment listed elsewhere in Section 1610. Beyond allowing attachment of all property that ultimately belongs to the foreign sovereign, Section 1610 also provides that attachment will be permitted "regardless of" whether the traditional factors for piercing the veil between states and their juridically separate instrumentalities are met, overruling this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). Subsection 1610(g) likewise subjects property to attachment even if it is "regulated by the United States Government by reason of an action taken" by the executive under TWEA or IEEPA. 28 U.S.C. § 1610(g)(2). But unlike under subsection (f)(3) and TRIA, the President is given no authority under subsection (g)(2) to waive this right of attachment in the interest of national security. Indeed, the only limitation on attachment or execution provided in subsection 1610(g) is in subsection (g)(3), which permits a court to protect the interests of a third party

that may have an interest in the property to be attached or executed upon, but "who is not liable in the action."

Subsection 1610(g) thus gives every indication that it was meant to serve as a separate, self-contained exception to the rules regarding attachment immunity located elsewhere in Section 1610. In it, Congress evinced its intent to hold designated sponsors of terror like Respondent Iran to a completely separate body of rules than the commerce-based restrictions on attachment immunity FSIA imposes on law-abiding nations in subsections 1610(a)-(e). Through these unique rules, Congress meant to strip terrorism-sponsoring nations of virtually all attachment immunity, thus ensuring that victims of terror will be able to execute on virtually all property belonging to such states located within the jurisdiction of U.S. courts. Recognizing this absolutist purpose is essential to remain faithful to the consistent legal framework Congress has developed over decades, intended to deprive sponsors of terrorism of any assets they could use to finance terrorist-related activities.

The much narrower interpretation of subsection 1610(g) advanced by the Government and Respondents, on the other hand, is inconsistent with that purpose. They maintain that Congress's addition of subsection 1610(g) was intended only to "abrogate[] distinctions between a foreign state and its agencies and instrumentalities for purposes of attachment," but otherwise shield the assets of terror-supporting nations under the same "restrictive immunity" afforded to law-abiding nations, thus allowing only property used in "commercial activity" to be attached. US Amicus Br. I. In the view they adopt, subsection 1610(g) merely "counteract[s]" the presumption adopted in *Bancec* that property of state instrumentalities

would remain separate from the states themselves, and unavailable for attachment to satisfy a judgment entered against the state. Resp. Memo. In Op. 10. Accordingly, the Government and Respondents would demand that terror victims "satisfy[] the criteria for overcoming immunity elsewhere in §1610" to attach or execute upon a terror-sponsoring state's assets. *Id.* at i. This would mean that only property used for a commercial activity could be attached to enforce a terrorism judgment, as subsections 1610(a) & (b) demand.

This view cannot be squared with Congress's entire body of antiterrorism law, of which subsection 1610(g) is an integral part. Given that, in all other areas of this consistent legal framework, Congress has deemed it necessary to strip terror-sponsoring nations of *virtually all* immunity, as the best hope of inhibiting their capacity to fund terrorism and persuading them to change course, it makes no sense for Congress to stop short of full repeal in 1610(g), and allow attachment of foreign property only when used for commercial activities. It further serves no discernable purpose for Congress to deny terror victims the right to attach discrete assets owned by terror-sponsoring nations located within the jurisdiction of U.S. courts, where elsewhere Congress has consistently recognized the need to seize *all* assets of terror-sponsoring nations, wherever they might be located. And it blinks reality to suggest Congress would give civil judgments some secondary status as weapons for combatting terror-financing nations, where it has so often explicitly recognized the utility of such civil judgments as holding equal place among the other economic tools at its disposal.

2. Subsection 1610(g) does more than merely override Bancec*'s distinctions between a foreign government and its instrumentalities.*

Iran and the Government cannot answer any of these concerns, and their attempts to find support for their narrow reading in the text or history of subsection 1610(g) are likewise unsuccessful. For instance, it likely is true that Congress was motivated to change 1610(g) by the need to "abrogate[ ]" *Bancec*'s "distinctions between a foreign state and its agencies and instrumentalities," US Amicus Br. I. Indeed, *part* of 1610(g), in subdivisions (1)(A) through (1)(E), clearly reads as a response to *Bancec*, making clear that "the property of an agency or instrumentality" of a state "is subject to attachment" and "execution," and noting that this should be the case "regardless of" the factors announced in *Bancec*. But a desire to overrule *Bancec* merely describes the *impetus* for Congress's action. It does not delimit the content of Congress's response.

There is another part of subsection 1610(g) that cannot be explained by a mere desire to overrule *Bancec*'s rules for distinguishing between the property of the state and its separately incorporated instrumentalities. In addition to allowing attachment and execution upon property belonging to a state's "separate juridical entit[ies]," subsection 1610(g) elsewhere announces that the "property of a foreign state" and that of its "agenc[ies]" shall both be available for attachment and execution. *Bancec*'s rules have no operation for either of these categories of property—there are no corporate formalities between the state and *itself* to ignore; nor do such corporate barriers

normally exist between the state and its agencies. By including these provisions in subsection 1610(g), Congress signified that it intended to solve the *Bancec* problem by acting broadly, by reducing *all* questions concerning attachment of a terror-sponsoring state's property to "a simple ownership test," 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg), thereby "subject[ing] any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution," H.R. Rep. No. 11-447, at 1001 (2007). Accordingly, Congress responded to the issues that *Bancec* raised in the same manner it responded to all other problems related to the immunities of terror-sponsoring nations—by removing them completely.

3. Subsection 1610(g)'s requirement that attachments proceed "as provided in this section" incorporates only the procedural requirements located elsewhere in Section 1610.

Nor is Respondents' forced reading compelled by subsection 1610(g)'s requirement that attachments under its stand-alone exception occur "as provided in this section." Respondents and the Government contend that this language as incorporates all of the other requirements for attachments found elsewhere in Section 1610, which they take to mean that attachments of terror-sponsoring nations' property under subsection (g) must take place on the same substantive terms as attachments of property belonging to law-abiding foreign sovereigns, which are subject to the commerce-based restrictions in subsections 1610(a)–(b). But that reading is unfaithful to the language they reference, and would render the broad, unqualified

language in subsection 1610(g)'s stand-alone exception largely redundant and ineffective.

Instead, by dictating that attachments occur in the *manner* "provided in this section," this language in subsection 1610(g) focuses on *procedure*, and is most naturally understood as incorporating only the procedural aspects of attachments outlined elsewhere in Section 1610. Thus, for example, the referenced language would incorporate subsection 1610(c)'s requirement that attachment or execution shall not be permitted until a "reasonable period of time has elapsed following entry of judgment and the giving of" notice. And it likewise incorporates the obligations of the Secretaries of Treasury and State, outlined in Section 1610(f)(2)(A), to assist in "identifying, locating, and executing against the property" of a foreign state for attachment. Subsection 1610(g)'s command that attachments occur "as provided in this section" incorporates all of these procedures, even though some of them, such as under subsection 1610(c), by their terms only apply to attachments under "subsections (a) and (b)."

Indeed, subsection 1610(g)'s incorporation of the procedures provided "in this section" extends even to the rules for prejudgment attachment outlined in subsection (d). Although such prejudgment attachments require a waiver by the sovereign—which one would not normally expect to come from a terrorism-sponsoring state—it is not only possible, but entirely feasible that such a procedure might nonetheless come into play in terrorism cases. It is not hard to imagine the U.S. negotiating a settlement with a reformed terrorist state in which a procedure for processing victims' claims is negotiated that makes use of the prejudgment attachment rules in subsection (d).

When it comes to Section 1610's substantive restrictions, however, these survive *only to the extent* they are not specifically overridden by the more specific provisions of subsection 1610(g). Thus, for example, Section 1610(f)(3)'s option allowing the President to waive a right of attachment for blocked assets cannot applicable to attachments under subsection 1610(g), because incorporating that waiver authority would override subdivision 1610(g)(2)'s specific terms, which provide the President no such waiver right. Yet under the Respondents' and Government's contrary reading, attachments would somehow be subject to *both* sets of rules—a logical impossibility. It is likewise impossible to import the commerce-based restrictions in subsections 1610(a) & (b) into attachments under subsection 1610(g), because incorporating them would contradict Section 1610(g)'s textual command that *all* property in which the terror-sponsor has a beneficial interest is available for attachment and execution, not just property used in commerce. The language simply cannot be given the unyielding reading that the other side demands.

4. Any redundancy in Section 1610's terrorism exceptions is no vice, and forces no narrower reading of subsection 1610(g).

Concerns that interpreting subsection 1610(g) as a stand-alone immunity exception would render subsections 1610(a)(7) and (b)(3) "superfluous," Resp. Mem. in Opp. 12, Gov't Br. in Opp. 7, should also force no narrower reading. There is no question that Congress approached the drafting of Section 1610, and subsection (g), with the same "'belt-and-suspenders' caution" *Yates* v. *United States*, 135

S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting), it has employed in all of FSIA, yielding considerable overlap in provisions.

This multi-layered redundancy is a feature, not a bug, in the statute. Congress not infrequently takes this approach. Abbe R. Gluck & Lisa Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934 (2013). And here it serves an important purpose: not only to preserve the right of attachment for judgments under the old terrorism exception, but also to ensure that if there were "some flaw" in Congress's drafting, and a person was somehow unable to attach assets under subsection 1610(g) for whatever reason, then attachment would still be available under subparts 1610(a)(7) and (b)(3) "as a backstop," albeit subject to the commerce-based restrictions on attachment in subsections 1610(a) and (b). *Yates*, 135 S. Ct. at 1096 (Kagan, J., dissenting).

Congress can hardly be faulted for taking cautious approach, given FSIA's complexity, the ingenuity foreign sovereigns have exhibited in interpreting its terms to avoid liability, and the statute's considerable evolution over time, which continues even today. This is precisely this reason that the "rule against creating redundancy is far from categorical" *King* v. *Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting), and cannot overcome subsection 1610(g)'s clear command that *all* property of the foreign sovereign be available for attachment and execution, without regard to whether it is used in commerce.

Indeed, it is the interpretation urged by the Government and Respondents, and adopted by the Court below, that has more serious flaws. Theirs would render a full

third of the statute's benefits a virtual nullity. If terror victims wishing to attach an agency's assets to collect a judgment against the state must proceed through the restrictions in subsection 1610(b) to reach an agent's assets, then such an avenue of recovery would never be used. This is because attachment under subsection (b) is only permitted when a party meets one of the exceptions to immunity in subsection (b)(1) through (b)(3). 28 U.S.C. § 1610(b). And in a terrorism case, only the terrorism exception in subsection 1610(b)(3) is likely to be available. But meeting that exception requires proving that the agency and the foreign sovereign itself were *both* involved in the acts of terrorism that caused the victim's injuries, because the victim must prove that the "agency or instrumentality" *itself* "is not immune by virtue of section 1605A or *** 1605(a)(7)." And that would make proceeding under subsection 1610(g) unduly burdensome, and virtually pointless, when the victim could proceed against the agency by itself. Risks like these make a strict reading urged by the Government and Iran impossible, and call instead for subsection 1610(g)'s provisions to be read in harmony with the other features of Section 1610, but only to extent they are not overridden with subsection 1610(g)'s stand-alone attachment rules.

Nor is the Court compelled to adopt a narrower reading of subsection 1610(g) to avoid intruding on other branches' responsibilities regarding matters "affect[ing] the United States' foreign relations." SG Amicus Br. 9. Questions regarding the proper scope and application of foreign sovereign immunity always present competing foreign policy concerns, especially when they involve our tenuous relations with state sponsors of terror. But the

proper balancing of these demands is ultimately a judgment that was Congress's to make. When Congress adopted subsection 1610(g), it decided to prioritize recovery for victims and terrorism deterrence over concerns that withdrawing immunity might adversely affect relations with other countries.

Congress has reached roughly the same balance on many other occasions in FSIA—often over the State Department's objections—including most recently, when it enacted JASTA in 2016. In the debates over JASTA, Congress heard similar concerns about potential reprisals and other risks to foreign relations that might arise expanding FSIA's exceptions to immunity. See H.R. 2040 Hr'g at 33 (warning of possible "political and foreign policy considerations"); *ibid.* (referring to the "grave matter" of "identifying states that are mortal threats to U.S. interests"); *id.* at 27 (warning that JASTA might "increase[] the exposure of our antiterrorism effort to foreign legal liability"); *id.* at 26 (outlining and responding to the State Department's "foreign policy-related concerns" with JASTA).

Indeed, these concerns were far more salient with JASTA, because that legislation expanded FSIA's terror-based exceptions to immunity beyond designated state sponsors of terror, with whom relations are already strained, to potentially implicate the interests of allies like Saudi Arabia. But Congress rejected these arguments all the same. And having failed to persuade Congress to diverge from its consistent stance on combatting terrorism through the State Department, the Executive Branch should not be permitted to rewrite the law through the Solicitor General's interpretation simply to fit its own policy objectives.

Furthermore, adopting an interpretation of subsection 1610(g) that aligns it with Congress's larger anti-terrorism objectives hardly cuts the political branches out of the process. The terrorism exception to judgment immunity in 1605A—and thereby the attachment immunity under 1610(g) with which it is intrinsically linked—depends upon an official designation by the Executive Branch that a particular country is a "state sponsor of terrorism," 28 U.S.C. § 1605A(a)(2)(A)(i)(I). Accordingly, if a particular terror attack presents especially grave foreign policy concerns, the decision whether to allow attachment is still in the hands of the Executive Branch. It can always step in to prevent attachment by changing that country's designation before suit is filed. *Id.* And under Section 5 of JASTA, 130 Stat. 854, the Secretary of State can request that litigation be stayed while a settlement is negotiated.

This Court thus got it right in *Bank Markasi* v. *Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016), when it interpreted subsection 1610(g) to make available for execution *all* "the property (whether or not blocked) of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state."

II. The unfettered ability of plaintiffs to hold foreign sovereigns accountable through civil attachment is vital in the fight against terror.

Interpreting subsection 1610(g) to allow attachment of the assets of terror-supporting countries is not only necessary to remain faithful to the statute's text and the purposes Congress has pursued throughout all of federal antiterrorism law. It is also imperative to preserve one of the most effective tools to deter states from supporting terrorism: imposing massive liability imposed through private lawsuits.

A. Civil litigation is a key weapon in the war on terror.

Amici have written elsewhere of the vital role that civil litigation plays in supplementing governmental antiterrorism efforts. Br. of Fmr. U.S. Counterterrorism and National Security Officials as Amici Curiae in Support of Petitioners at 20-28, *Jesner* v. *Arab Bank, PLC*, No. 16-449. This is because terror enterprises "rest[] on a foundation of money." See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Sen. Subcomm. on Courts & Admin. Practice*, 101st Cong. 84 (1990) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). When funds available to terrorists are constrained, their capabilities decline. Less money is available to maintain the high costs of terror networks and carry out operations. And terrorists are forced to route funds through ever more complicated, and less secure, means, increasing the likelihood that their violent plans will be uncovered.

Government efforts to combat terror financing have had some success. The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States* 382–383 (2004), <http://bit.ly/1jwpzQZ>. For instance, documents found in Osama Bin Laden's compound revealed that the global efforts to restrict terrorist funding frustrated al Qaeda's efforts to raise and transfer money around the world. Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* ix (2013).

Yet government enforcement alone is not enough to stanch the flow of terror funds. Limited government resources mean that many terror transactions simply lie beyond the government's reach, despite the more than $1 trillion spent since 9/11 to combat terror. Amy Belasco,

Cong. Research Serv., RL 33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* 5 (2014), <http://bit.ly/1IRYWqi>.

Civil litigation provides an essential complement to government enforcement efforts, augmenting the government's capabilities without adding to the taxpayer-borne bottom line. Civil claimants multiply the resources available to uncover terror-funding networks, and they possess monetary incentives that ensure that they will find and pursue leads that might otherwise go unnoticed. Civil litigation also provides advantages over criminal investigation and enforcement or multinational enforcement efforts, including a lower burden of proof, an absence of constitutional restrictions on investigation, and more liberal discovery rules than government or multinational investigating agencies enjoy. *Unfunding Terror* 325. It will thus come as no surprise that it was ultimately private plaintiffs, not federal law enforcement, that brought the Ku Klux Klan to its knees, through a string of wins in civil litigation. See Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing With Civil Litigation*, 41 Case W. Res. J. Int'l L. 65, 77 (2009).

B. Civil suits targeting foreign sovereigns are especially effective in deterring terror financing.

Suits against designated terror-supporting sovereigns can be especially effective in choking off funding to terror networks. The states that actively support terrorism are few in number—there are currently only three: Iran, Sudan, and Syria, *Country Report 2016* 304–306. But they represent some of the biggest funding sources of terror activities.

Civil litigation against such terror-supporting nations provides a major opportunity to halt terror funding. The fact that these nations provide a large percentage of many terror groups' operating budgets means that if even one of them could be persuaded to cease funding terror, it would deal a major blow to worldwide terror finance. Indeed, "while the prospect of large monetary judgments may have little or no deterrent value for radical jihadists, the same may not be true of individual donors, charitable organizations," or, for that matter, foreign sovereigns. *Unfunding Terror* at 324. And it will likely be easier to change the behavior of these terror-sponsoring states than to impact other sources of funding, such as drug trafficking, counterfeiting, ransom, bribes, and other illegal trade. Eben Kaplan, Council on Foreign Relations, *Tracking Down Terrorist Financing* (Apr. 4, 2006) <on.cfr.org/2i3KgOE>; Itai Zehorai, *The World's Richest Terrorist Organizations*, Forbes Int'l, Dec. 12, 2014, <bit.ly/2vC8WCA>.

"While the prospect of large monetary judgments may have little or no deterrent value for radical jihadists, the same may not be true of individual donors, charitable organizations," or, for that matter, foreign sovereigns. *Unfunding Terror* at 324. Since their sponsorship of terror is often as much military strategy as political or religious ideology, *e.g.*, Unclassified Report at 1–3, that strategic course could change if the costs of the strategy could be made to outweigh the benefits. This is especially true when many of these countries have substantial assets in the United States that might be attached to enforce civil terrorism judgments, such as the estimated $1.7 billion that Iran has here. H.R. 2040 Hr'g 63 (Testimony of Professor Jimmy Gurulé). Accordingly, there is some chance

that these nations' strategic behavior will be shaped by the prospect of massive terror-related judgments. Faced with potential awards that often range in the hundreds of millions—or even billions—of dollars, *e.g.*, *Bank Markazi*, 136 S. Ct. at 1317 (concerning multiple judgments against Iran "together amounting to billions of dollars"), these nations might eventually be persuaded that it is better to stop funding terror, and join the body of legitimate nations, than to continue funneling money to support terror activities only to face massive liabilities on top of those costs. Moreover, for these countries, the condemnation of a civil judgment itself will provide a meaningful disincentive. Indeed, experts estimate that civil judgments have had a noticeable impact upon the present regime in Iran, even if they have not convinced them to change. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 62 (D.D.C. 2003).

But for these civil judgments to have a meaningful impact, they must come with a reasonable prospect that the award will be collected, and that assets of the foreign sovereigns might be attached. Terror-sponsoring countries will be little dissuaded by a monetary award, no matter the size, when there is no realistic prospect that it could be enforced. By the same token, plaintiffs will not bring suit if there is no prospect for recovery. The idea that foreign sovereigns will be able to shield their assets from attachment even where they are located in the United States, thus provides exactly the wrong incentive. This provides yet another reason why subsection 1610(g) should be interpreted to allow attachment of all foreign sovereigns' property to enforce a terror-related judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

INDEX

Appendix 1a

APPENDIX

William C. Banks – William C. Banks is the Board of Advisors Distinguished Professor at Syracuse University College of Law and Founding Director of the Institute for National Security and Counterterrorism, a recognized leader in research and education on national and international security and terrorism. Professor Banks' wide-ranging research focuses on i national security and counterterrorism law; laws of war and asymmetric warfare; transnational crime and corruption.

Professor Banks has served as a Special Counsel to the US Senate Judiciary Committee (for the confirmation hearings of Supreme Court nominee Stephen G. Breyer); on the ABA Standing Committee on Law and National Security; as a member of the InfraGard National Members Alliance Board of Advisors; on the Advisory Council for the Perpetual Peace Project; on the Executive Board of the International Counter-Terrorism Academic Community (ICTAC); as an Editorial Board member at The International Centre for Counter-Terrorism in The Hague, The Netherlands; and as a Distinguished Fellow of the Institute for Veterans and Military Families at Syracuse University. Banks also is the Editor-in-Chief of the Journal of National Security Law & Policy.

Kevin Cieply – Kevin Cieply is President and Dean of the Ave Maria School of Law and an expert on national security law. Before his academic career, Dean Cieply served as Chief, Legal Operations (Land), North American Aerospace Defense Command (NORAD) and U.S. Northern Command (NORTHCOM), concentrating

on counterterrorism and Defense Support of Civilian Authorities. He also served for more than 22 years in the Army and Wyoming Army National Guard as a helicopter pilot and judge advocate. In civilian life, he also worked as Special Assistant U.S. Attorney and Senior Legal Advisor on all military matters for the Wyoming Army National Guard.

Jimmy Gurulé – Professor Gurulé is a tenured member of the law faculty at Notre Dame Law School, where he teaches courses in criminal law, international criminal law, the law of terrorism, and national security Law. Professor Gurulé served as Under Secretary (Enforcement) at the U.S. Department of the Treasury, from 2001-2003. In this capacity, he played a central role in developing and implementing the U.S. Government's counterterrorist financing strategy. He also served as Assistant Attorney General from 1990-1992 during the administration of President George H.W. Bush. He has published numerous books and articles on counterterrorism law and legal strategies for combating the financing of global terrorism.

Malvina Halberstam – Professor Halberstam is a member of the founding faculty of the Benjamin N. Cardozo School of Law. She has served as an assistant district attorney, as a reporter for the American Law Institute (Model Penal Code Project), and as a counselor on international law for the US Department of State, Office of the Legal Advisor. As counselor, she supervised the State Department's comments on what became the Restatement of U.S. Foreign Relations Law (Third) and headed the U.S. delegation in the negotiations on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in Rome in

1988.

Dennis M. Lormel – Mr. Lormel is an international expert addressing terrorist financing, money laundering, fraud, and financial crimes. He amassed extensive major case experience in the FBI while working there from 1976 through 2003, as a street agent, supervisor and senior executive, particularly in complex finance related crimes. In response to the terrorist attacks of September 11, 2001, Mr. Lormel assumed responsibility for establishing, coordinating and directing the FBI's comprehensive terrorist financing initiative, serving as Chief of the Terrorist Financing Operations Section, in the Counterterrorism Division. Mr. Lormel is a member of the Advisory Board of the Association of Certified Anti-Money Laundering Specialists.

Dennis B. Ross – For more than twelve years, Ambassador Ross played a leading role in shaping U.S. involvement in the Middle East peace process and dealing directly with the parties in negotiations. Ambassador Ross was the U.S. point man on the peace process in both the George H. W. Bush and Bill Clinton administrations. He was instrumental in assisting Israelis and Palestinians to reach the 1995 Interim Agreement; he also successfully brokered the 1997 Hebron Accord and facilitated the 1994 Israel-Jordan peace treaty. Ambassador Ross is currently counselor and William Davidson Distinguished Fellow at The Washington Institute for Near East Policy. Before rejoining the Institute in 2011, he served for two years as special assistant to President Obama and the National Security Council senior director for the Central Region, and a year as special advisor to Secretary of State Hillary Rodham Clinton.

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No. 16-534

In the
Supreme Court of the United States

JENNY RUBIN, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF FOUNDATION FOR DEFENSE OF DEMOCRACIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE TEXT OF § 1610(g) SUPPORTS A BROAD CONSTRUCTION 6

II. THE PURPOSE OF § 1610(g) AND RELATED PROVISIONS SUPPORTS A BROAD CONSTRUCTION 9

A. The History of FSIA Amendments Relating to State-Sponsored Terrorism Supports a Broad Construction of § 1610(g) 10

B. Legislative History Supports a Broad Construction of § 1610(g) 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Acree v. Republic of Iraq,
370 F.3d 41 (D.C. Cir. 2004) 13

Bank Markazi v. Peterson,
136 S. Ct. 1310 (2016) 5

Bennett v. Islamic Republic of Iran,
825 F.3d 949 (9th Cir. 2016) 7, 8, 16

Cabell v. Markham,
148 F.2d 737 (2d Cir. 1945) 10

Dammarell v. Islamic Republic of Iran,
281 F. Supp. 2d 105 (D.D.C. 2003) 13

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 4, 10

First National City Bank v. Banco Para el Comercio Exterior de Cuba,
462 U.S. 611 (1983) 2, 3, 8, 9, 14

Gates v. Syrian Arab Republic,
755 F.3d 568 (7th Cir. 2014) 2, 7

In re Islamic Republic of Iran Terrorism Litig.,
659 F. Supp. 2d 31 (D.D.C. 2009) 12, 13, 14, 16

Moskal v. United States,
498 U.S. 103 (1990) 9

TABLE OF AUTHORITIES—continued

Page(s)

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977) 16

Owens v. Republic of Sudan,
864 F.3d 751 (D.C. Cir. 2017) 14

Peterson v. Islamic Republic of Iran,
627 F.3d 1117 (9th Cir. 2010) 2, 7

Price v. Socialist People's Libyan Arab Jamahiriya,
294 F. 3d 82 (D.C. Cir. 2002) 13

Stone v. INS,
514 U.S. 386 (1995) 10

United States v. Fausto,
484 U.S. 439 (1988) 4

Weinstein v. Islamic Republic of Iran,
831 F. 3d 470 (D.C. Cir. 2016) 2, 7

STATUTES

28 U.S.C. § 1601(f) 4, 5, 8, 11

28 U.S.C. § 1605A 2, 6, 7, 8, 13, 14

28 U.S.C. § 1610 ..... 7, 8, 14

28 U.S.C. § 1610(a)(7) 3, 4, 5, 8, 9, 10, 13

TABLE OF AUTHORITIES—continued

Page(s)

28 U.S.C. § 1610(g) ..... *passim*

50 U.S.C. §§ 1701-1706 ..... 5, 11

Pub. L. 104-132, § 221, 110 Stat. 1242-43 (1996) 4, 9, 10

Pub. L. 105-277, Div. A, Title I, § 117, 112 Stat. 2681-491 (1998) 5, 11

Pub. L. 107-77, § 626, 115 Stat. 748, 803 (2001) 12

Pub. L. 107-297, § 201, 116 Stat. 2322, 2337 (2002) 6, 12

Pub. L. 110-181, § 1083, 122 Stat. 3, 338 *et seq.* (2008) 6, 12, 13, 14

Pub. L. No. 104-208, Div. A, § 589, 110 Stat. 3009-172 (1996) 11

OTHER AUTHORITIES

154 Cong. Rec. S54-55 (daily ed. Jan. 22, 2008) 15

49 Fed. Reg. 2836-02 (Jan. 23, 1984) 5, 11

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) 5, 11

TABLE OF AUTHORITIES—continued

Page(s)

H.R. Rep. No. 104-383 (1995) 10

H. R. Rep. No. 110-477 (2007) (Conf. Rep.) 6, 15

H. Rep. No. 107-278 (2001) 12

Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998) 5, 8, 11

INTEREST OF AMICI CURIAE [1]

The Foundation for Defense of Democracies ("FDD") is a non-profit, non-partisan section 501(c)(3) policy institute focusing on foreign policy and national security. Through its Iran Project and other initiatives, FDD conducts extensive research on state sponsorship of terrorism and efforts to combat such terrorism. FDD's nonpartisan research and analysis has been used by Members of Congress, including to develop legislation relating to the scope of Iran's sovereign immunity from attachment and execution to satisfy judgments based on that state's sponsorship of terrorism. FDD also seeks to reduce the amount of oil and other commercial revenues the Iranian regime can devote to supporting terrorism, advancing its illicit nuclear and ballistic missile programs, and repressing its citizens.

FDD has a significant interest in this case because it has provided research, analysis, and expertise to Congress relating to terrorism in general and Iran's state sponsorship of terrorism in particular.

FDD firmly believes that Congress and other branches of the US government should remain resolute in their efforts to hold Iran accountable for sponsoring acts of terrorism against U.S. citizens around the world, and that Iran should not be permitted to shield its assets from terrorism-related judgments.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

Section 1610(g) of the Foreign Sovereign Immunities Act is instrumental to these efforts.

SUMMARY OF ARGUMENT

Terror victims holding judgments against the Republic of Iran entered under 28 U.S.C. § 1605A, should be empowered to execute against property undisputedly owned directly by Iran (Pet. App. 8) under color of 28 U.S.C. § 1610(g).

1. Section 1610(g) withdraws sovereign immunity from execution on terror judgments for two types of property: (i) "the property of a foreign state" and (ii) "the property of an agency or instrumentality of such a state." The provision makes *both* types of property "subject to . . . execution" on a judgment entered under section 1605A (subject to conditions discussed below).

The simplest and most natural reading of the text of § 1610(g) is that it applies, as written, to "the property of a foreign state," such as the artifacts at issue in this case. "Once a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign." *Weinstein v. Islamic Republic of Iran*, 831 F. 3d 470, 483 (D.C. Cir. 2016) (emphasis by the Court); *see Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.3 (9th Cir. 2010) (with the addition of § 1610(g), "judgment creditors can now reach *any* U.S. property in which Iran has any interest") (emphasis added); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) ("[Section] 1610(g) allows attachment of the property of a foreign state").

2. The decision below erroneously read § 1610(g) as doing only a limited task: "it abrogates the *Bancec* rule for terrorism-related judgments" and "is

not itself an exception to execution immunity for terrorism-related judgments," so that the holders of such judgments may only execute on the property of a foreign state if such property is "used for a commercial purpose" and thus available for execution under § 1610(a)(7). Pet. App. 35.

While the lower court correctly observed that § 1610(g) abrogates the "*Bancec* rule" for instrumentalities of state sponsors of terrorism, it incorrectly concluded that § 1610(g) does nothing more.

a. Limiting the text this way would render the portion of § 1610(g) permitting execution against "the property of a foreign state" superfluous. The *Bancec* factors are used for "determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632 (1983) ("*Bancec*"); *see* Pet. App. 23-26. Those factors are *only* relevant when deciding whether the "normally separate juridical status" of an *instrumentality* of a state must be disregarded. Such a question simply never arises where, as here, the property is owned directly by the *foreign state itself*. The *Bancec* factors are completely irrelevant to execution against the property of an *actual* state (as opposed to an *instrumentality* of the state), so there would be no point to including "the property of a foreign state" in a statutory provision designed *only* to abrogate the *Bancec* rule.

b. The court below grounded its erroneous conclusion on the phrase "as provided in this section," contending that the phrase *had* to be read to incorporate other *substantive* subsections—like

subsection (a)(7)—and that reading the phrase as incorporating *procedural* provisions like subsection (f)(1) would offend the principle of statutory construction against superfluity, because subsection (f) "never became operative." Pet. App. 27, 33 (emphasis omitted). As discussed below, however, the lower court's factual premise was inaccurate. Subsection (f)(2), which requires the Government to assist terror victims in identifying assets, has always been operative. It makes far more sense to read the term "as provided in this section" to embrace *procedural* provisions like subsection (f)(2).

c. The lower court's fundamental error was that it failed to engage in the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

By the time Congress enacted § 1610(g) in 2008, property of a foreign state "used for a commercial activity" had *already* been subject to execution for terror victims holding judgments against state terror sponsors for more than a decade. *See* Pub. L. 104-132, § 221, 110 Stat. 1242-43 (1996) (adding 28 U.S.C. § 1610(a)(7)). No possible purpose would have been served by adding a *second* provision, supposedly benefiting terror victims, that did the exact same thing as § 1610(a)(7).

Viewed in the context of the "many laws enacted over time" concerning this topic, § 1610(g) is best read as *increasing* the power of terror victims to obtain and execute judgments against property owned by state sponsors of terrorism, rather than simply cross-referencing a right that already existed.

Indeed, in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016), this Court viewed § 1610(g) as "expanding the availability of assets for postjudgment execution," "to make available for execution the property . . . of a foreign state sponsor of terrorism, *or* its agency or instrumentality, to satisfy a judgment against that state." (Emphasis added.)

a. Congress withdrew sovereign immunity from designated state sponsors of terror in 1996. 110 Stat. at 1241. (The Republic of Iran had been so designated in 1984. 49 Fed. Reg. 2836-02 (Jan. 23, 1984).) In that statute, Congress also withdrew sovereign immunity from execution of the property of such states if such property was "used for a commercial activity." 110 Stat. at 1242-43 (adding 28 U.S.C. § 1610(a)(7)).

b. In 1998, Congress amended the Foreign Sovereign Immunities Act ("FSIA") to provide that assets of a state sponsor of terrorism blocked under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707, could be subject to execution and to instruct the Executive Branch to assist terror victims in identifying assets for execution. *See* Pub. L. 105-277, § 117, 112 Stat. 2681-491 (1998) (adding 28 U.S.C. § 1601(f)). (Iran's assets had been blocked under the IEEPA since 1979. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).) The President immediately exercised his power to waive the blocked asset portion of this new provision (§ 1610(f)(1)), leaving subsection (f)(2) operational. *See* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998).

c. In 2002, Congress sharply limited the Presidents' ability to waive the power of terror victims to execute on blocked assets. *See* Terrorism Risk Insurance Act ("TRIA"), Pub. L. 107-297, § 201, 116 Stat. 2322, 2337 (2002).

d. In 2008, Congress added § 1610(g) as part of the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"), Pub. L. 110-181, § 1083, 122 Stat. 3, 338. The House Report said that the provision was "written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." H. R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added).

In that statutory context, there can be no doubt that the 2008 addition of § 1610(g) was designed to *facilitate* the execution of terror judgments and *expand* the class of state-owned assets available to holders of judgments under § 1605A. Repeatedly, Congress has acted to make the promise of its withdrawal of immunity for state sponsors of terror a reality rather than an illusory promise. The Court should effect that intent, reflected in the text and crystal clear from the series of statutory enactments between 1996 and 2008.

ARGUMENT

I. THE TEXT OF § 1610(g) SUPPORTS A BROAD CONSTRUCTION

Section 1610(g) provides, in part:

> the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including

> property that is a separate juridicial entity or is an interest held directly or indirectly in a separate juridicial entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of [certain factors].

28 U.S.C. § 1610(g). By its terms, subsection (g) does not restrict execution to property used for a "commercial activity." Nor does it make specific reference to other provisions of § 1610 that permit execution of property "used for a commercial activity." Thus, in *Weinstein v. Islamic Republic of Iran*, 831 F. 3d 470, 483 (D.C. Cir. 2016), the court observed quite simply that "[o]nce a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign." (Emphasis by the Court.) Other courts read the statute the same way. *See Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.3 (9th Cir. 2010) (with the addition of § 1610(g), "judgment creditors can now reach *any* U.S. property in which Iran has any interest") (emphasis added); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) ("§ 1610(g) allows attachment of the property of a foreign state").

It is true that § 1610(g) includes the phrase "as provided in this section," but that the phrase is best read as a procedural one, rather than an incorporation of other substantive provisions. This was the view of the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016), which read § 1610(g) as withdrawing sovereign immunity from execution of terror judgments in order to enable terrorism judgment

creditors to enforce their judgments against the property of a state sponsor of terrorism regardless of whether the property is used for commercial activity. Specifically, the phrase "as provided in this section" is best read as referring to the procedures in § 1610(f), which, "like § 1610(g), relates to judgments obtained under § 1605A and its predecessor, § 1605(a)(7). *Bennett*, 825 F.3d at 959. To be sure, the President has waived subsection (f)(1), *see* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998), but the President has no power to waive—and has never waived—subsection (f)(2).

The lower court erroneously concluded that a judgment creditor proceeding under § 1610(g) still must satisfy one of the *other* substantive exceptions to execution immunity "as provided" elsewhere in § 1610. Pet. App. 35. In its view, § 1610(g) merely removes the so-called *Bancec* factors for terror judgments. *Id.* (These factors were developed after *Bancec* held that the courts should "determin[e] the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." 462 U.S. at 633. *See* Pet. App. 23-26.) In other words, the lower court said that the only work that § 1610(g) does is to remove the barriers to treating an *instrumentality* of the state as if it were the state, notwithstanding the ordinary rules applied in *Bancec*. Pet. App. 35; *see also Resp. Islamic Republic of Iran* Br. in Opp. at 17; U.S. *Amicus* Br. at 10.

The trouble with this reading of the statute is that it does not give meaning to the phrase "property of a foreign state" in § 1610(g). Before enactment of § 1610(g), the "property of a foreign state" "used for a commercial purpose" was *already* subject to

execution to satisfy a terrorism judgment against the foreign state itself. *See* 28 U.S.C. § 1610(a)(7) (added as part of Pub. L. 104-132, § 221, 110 Stat. 1214, 1242-43 (1996)).

Moreover, the *Bancec* factors are completely irrelevant to "property of a foreign state," because they reflect a standard for determining whether to disregard the separation between a state's instrumentality and the state itself.

Under the lower court's reading of § 1610(g), the phrase "property of a foreign state" would thus be doubly superfluous—it is completely irrelevant to the *Bancec* factors, and it would be adding a right of execution on property that was already subject to execution, and had been for more than a decade. A "court should give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109 (1990).

II. THE PURPOSE OF § 1610(g) AND RELATED PROVISIONS SUPPORTS A BROAD CONSTRUCTION

As Judge Learned Hand explained:

> Of course it is true that the words used . . . are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.). "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). And, where "Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

A. The History of FSIA Amendments Relating to State-Sponsored Terrorism Supports a Broad Construction of § 1610(g)

From the 1996 enactment of the terrorism exception to sovereign immunity through § 1083 of the 2008 NDAA, Congress addressed state-sponsored terrorism six times in twelve years. All this legislative activity marched in the same direction: toward making it easier for terror victims to obtain and execute on judgments against state sponsors of terrorism. These amendments reflect Congress' sustained effort to compensate victims of state-sponsored terrorism, as well as to punish and deter the state sponsors of terrorism perpetrated against U.S. citizens. Put simply, Congress wants state sponsors of terrorism to pay.

In 1996, Congress enacted the FSIA's state-sponsored terrorism exception to immunity. *See* Pub. L. 104-132, § 221, 110 Stat. 1214, 1242-43 (1996). As originally enacted, Section 1605(a)(7) eliminated the immunity of state sponsors of terrorism from suits brought by U.S. nationals seeking money damages for terrorist acts that caused personal injury or death. Congress added Section 1605(a)(7) to the FSIA to "give American citizens an important economic and financial weapon" against state sponsors of terrorism. H.R. Rep. No. 104-383,

at 62 (1995). By that time, Iran was already a designated state sponsor of terrorism, *see* 49 Fed. Reg. 2836-02 (Jan. 23, 1984), and its assets in the United States had been blocked under color of the IEEPA, 50 U.S.C. §§ 1701-1707. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).

Five months after this amendment, Congress amended the FSIA with the Civil Liability for Acts of State Sponsored Terrorism provision, also known as the Flatow Amendment. The Flatow Amendment, which was named after an American citizen killed in a terrorist attack by a suicide bomber who drove a van full of explosives into a bus in Israel, expanded remedies for victims of state-sponsored terrorism. It enhanced victims' rights by providing for punitive damages, previously unavailable under the statutory scheme of the FSIA. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009-172 (1996), codified at 28 U.S.C. § 1605 note (2006).

In 1998, Congress amended the FSIA to provide that assets of a state sponsor of terrorism blocked under the IEEPA could be subject to execution or attachment in aid of execution of a judgment against that State. *See* Pub. L. 105-277, § 117, 112 Stat. 2681-491 (1998), codified at 28 U.S.C. § 1601(f)(1)(A). Because of objections from the Executive branch, however, Section 117 also gave the President authority to "waive the requirements of this section in the interest of national security." *Id.* After signing the legislation into law, President Clinton immediately executed the waiver. *See* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2001, Congress issued a directive to the President to submit "a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism)." Pub. L. 107-77, § 626, 115 Stat. 748, 803 (2001). The House Report noted that this directive was added to do away with "the current ad hoc approach to compensation for victims of international terrorism," because it was "imperative that the Secretary of State, in coordination with the Department of Justice and Treasury and other relevant agencies, develop a legislative proposal that will provide fair and prompt compensation to all U.S. victims of international terrorism." H. R. Rep. No. 107-278, at 170 (2001) (Conf. Rep.).

In 2002, Congress passed and the President signed the Terrorism Risk Insurance Act ("TRIA") into law, making blocked assets of State sponsors of terrorism available to victims to satisfy judgments for compensatory damages. *See* Pub. L. 107-297, § 201, 116 Stat. 2322, 2337 (2002).

Despite these efforts, a number of "practical, legal, and political obstacles" made it "all but impossible for plaintiffs in [] FSIA terrorism cases to enforce their default judgments against Iran." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009).

It was in this context that Congress enacted § 1083 of the 2008 NDAA. Judge Royce Lamberth (who had presided over more than a decade of litigation against the Islamic Republic of Iran under the state sponsor of terrorism exception of the Foreign Sovereign Immunities Act) observed that

"the reforms implemented through § 1083 [of the 2008 NDAA] add a number of measures that are intended to help plaintiffs succeed in enforcing court judgments against state sponsors of terrorism, such as Iran." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 36.

In § 1083 of the 2008 NDAA, Congress first addressed significant substantive hurdles faced by terrorist victims exercising their rights in U.S. courts. While some courts had held that Section 1605(a)(7) gave plaintiffs a private right of action against the foreign state itself, other courts determined that the provision applied only to actions against the officials, employees, or agents of a foreign state. *Compare Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F. 3d 82, 87 (D.C. Cir. 2002) (noting that Flatow Amendment could permit cause of action against foreign state) with *Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004) (holding that neither § 1605(a)(7) nor the Flatow Amendment created cause of action against foreign states themselves); *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 191-92, 194 (D.D.C. 2003) (concluding that congressional enactments "make clear that Congress intended to create a cause of action against foreign states"). Section 1083 of the 2008 NDAA did away with this problem by replacing Section 1605(a)(7) with an even broader exception, now codified at 28 U.S.C. § 1605A, which again facilitated victims' efforts to reach State assets to satisfy judgments. This new Section 1605A made clear that a designated state sponsor of terrorism could not be immune from any suit brought by a victim of terrorism for an act of terrorism or for providing material support or resources "if such act or provision of material support or resources is

engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605A(a)(1). *See also Owens v. Republic of Sudan*, 864 F.3d 751, 778 (D.C. Cir. 2017) (finding that the "purpose and statutory history of the FSIA terrorism exception" and the "plain meaning of § 1605A(a) grants the courts jurisdiction over claims against designated state sponsors of terrorism that materially support extrajudicial killings committed by nonstate actors.").

Also in § 1083 of the 2008 NDAA, Congress added the new subsection (g) to 28 U.S.C. § 1610. As discussed, § 1610(g) subjects to attachment and execution upon judgment "the property of a foreign state against which a judgment is entered under section 1605A," as well as the property of an agency or instrumentality of such a state, "as provided in this section, regardless of" the *Bancec* factors. *See* 28 U.S.C. § 1610(g)(1).

Directly addressing § 1610(g), Judge Lamberth wrote that "these latest additions to the FSIA demonstrate that Congress remains focused on eliminating those barriers that have made it nearly impossible for plaintiffs in these actions to execute civil judgments against Iran or other state sponsors of terrorism." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 62.

B. Legislative History Supports a Broad Construction of § 1610(g)

The legislative history of § 1610(g) also elucidates the purpose of the provision. Section 1610(g)'s purpose, as explained by the House Committee Report, is to "give claimants who obtain a

judgment against a foreign state recourse to property of the foreign state in execution or attachment in aid of execution of the judgment." The provision "is written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." H. R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added). According to Senator Lautenberg, one of the sponsors of the legislation, "[t]he existing law passed by Congress in 1996 has been weakened by recent judicial decisions. This legislation fixes these problems." 154 Cong. Rec. S54 (daily ed. Jan. 22, 2008) (statement of Sen. Lautenberg). *See also id.* at S54-55 ("Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions.").

This statutory amendment, like its predecessors, reflect a dialectic. The Executive Branch and some courts say to terror victims, no, you cannot collect; Congress says, yes you can. Congress' unyielding objective has been to make it possible for terror victims to collect from state sponsors of terrorism.

The legislative history's focus on Iran is also telling. According to Senator Lautenberg, "Congress's support of my provision will now empower victims of [Iranian-sponsored terrorism] to pursue Iran assets to obtain just compensation for their suffering. This is true justice through American rule of law." 154 Cong. Rec. S55. Indeed, Senator Lautenberg referred to Iranian support for terrorism as "inspiration for this new legislation." *Id.*

Since the Iran Hostage Crisis in 1979, Iran has posed a continuous threat to American interests and American lives. Iran-sponsored bombings,

assassinations, hijackings, and hostage-takings over the past four decades years have claimed thousands of victims, and future acts threaten to claim thousands more. This pervasive Iranian threat is virtually without parallel in the modern era, in terms of both its longevity and its intensity. American foreign policymakers understandably have used the means of national power and leverage their disposal to ensure that Iran is held accountable for harming U.S. citizens.

Section 1610(g) cannot be read without recognition of this broader foreign policy objective. The Ninth Circuit correctly recognized that "[g]iven both the text of the statute and Congress' intention to make it easier for victims of terrorism to recover judgments, ... § 1610(g) is a freestanding provision for attaching and executing against assets to satisfy a money judgment premised on a foreign state's act of terrorism." *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 960 (9th Cir. 2016). As the Ninth Circuit explained, "the blinders-on, technical focus of the [opposing] argument loses sight of Congress' main aim, which is for private plaintiffs who suffered torture and obtained tort judgments to get their money from terrorist states." *Id.* at 960 n.5.

Finally, § 1610(g) is a remedial statute. As such, a broad construction is appropriate. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977); *Iran Terrorism Litig.*, 659 F. Supp. 2d at 64.

Reading § 1610(g) as a free standing exception to attachment and execution immunity furthers the core policy goals underlying the law. This reading facilitates efforts by the victims of Iranian-sponsored terrorism to collect on the judgments they have

obtained, and helps ensure that Iran is held responsible for the injuries it has caused.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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Supreme Court of the United States

JENNY RUBIN, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF VICTIMS OF IRANIAN TERRORISM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

28 U.S.C. § 1610(g)(1) IS A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY 6

A. Congress adopted 28 U.S.C. § 1610(g)(1) in the course of expanding the rights of victims of terrorism 6

B. Section 1610(g)(1)'s text and structure allow victims to attach any property of a foreign state sponsor of terrorism or its instrumentalities 12

C. Section 1610(g)(1)'s background and purpose confirm the meaning of the broad text 14

D. Courts and commentators have understood Section 1610(g)(1) to be a freestanding exception to attachment immunity 16

E. Iran's narrow reading of Section 1610(g)(1) cannot be reconciled with the statute's text and purpose 22

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Alejandre v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999) 10

Bank Markazi v. *Peterson*, 136 S. Ct. 1310 (2016) 1, 5, 16

Bennett v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007) 2, 25

Bennett v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) 2, 14, 18, 25, 26

Bennett v. *Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013) 2

Bruesewitz v. *Wyeth LLC*, 562 U.S. 223 (2011) 27

Calderon-Cardona v. *Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014) 17

Cicippio-Puleo v. *Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) 9

Dean v. *United States*, 556 U.S. 568 (2009) 31

Estate of Heiser v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9 (D.D.C. 2011) 1, 20

First National City Bank v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 3, 10, 27

Flatow v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002) 10

Flatow v. *Islamic Republic of Iran*,
76 F. Supp. 2d 16 (D.D.C. 1999) 10, 30

Gates v. *Syrian Arab Republic*,
755 F.3d 568 (7th Cir. 2014) 19

Heiser v. *Islamic Republic of Iran*,
735 F.3d 934 (D.C. Cir. 2013) 18

Hester Int'l Corp. v. *Fed. Republic of Nigeria*,
879 F.2d 170 (5th Cir. 1989) 27

Kapar v. *Islamic Republic of Iran*,
105 F. Supp. 3d 99 (D.D.C. 2015) 19

Kirschenbaum v. *650 Fifth Ave. & Related Props.*,
830 F.3d 107 (2d Cir. 2016) 17

Lin v. *United States*,
561 F.3d 502 (D.C. Cir. 2009) 24

Martinez v. *Republic of Cuba*,
149 F. Supp. 3d 469 (S.D.N.Y. 2016) 19

Microsoft Corp. v. *I4I Ltd. P'ship*,
564 U.S. 91 (2011) 26, 27

Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. *Cubic Def. Sys., Inc.*,
984 F. Supp. 2d 1070 (S.D. Cal. 2013) 20

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 31

Oveissi v. *Islamic Republic of Iran*,
573 F.3d 835 (D.C. Cir. 2009) 23

Owens v. *Republic of Sudan*,
141 F. Supp. 3d 1 (D.D.C. 2015) 20

Owens v. *Republic of Sudan*,
864 F.3d 751 (D.C. Cir. 2017) 11

Peterson v. *Islamic Republic of Iran*,
515 F. Supp. 2d 25 (D.D.C. 2007) 24

Peterson v. *Islamic Republic of Iran*,
627 F.3d 1117 (9th Cir. 2010) 18

Republic of Argentina v. *NML Capital, Ltd.*,
134 S. Ct. 2250 (2014) 7

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004) 7

Rubin v. *Islamic Republic of Iran*,
456 F. Supp. 2d 228 (D. Mass. 2006) 30

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 8

Schooner Exch. v. *McFaddon*,
11 U.S. (7 Cranch) 116 (1812) 7

Stephan v. *United States*,
319 U.S. 423 (1943) 29

Verlinden B.V. v. *Cent. Bank of Nigeria*,
461 U.S. 480 (1983) 7

Walter Fuller Aircraft Sales v. *Republic of Philippines*,
965 F.2d 1375 (5th Cir. 1992) 10

Weinstein v. *Islamic Republic of Iran*,
831 F.3d 470 (D.C. Cir. 2016) 17

Wyatt v. *Syrian Arab Republic*,
800 F.3d 331 (7th Cir. 2015) 19

Statutes

28 U.S.C. § 1603(a) 10

28 U.S.C. § 1604 7

28 U.S.C. § 1605(a)(2) 7

28 U.S.C. § 1605(a)(7) (2006) 9, 13, 23, 24, 25

28 U.S.C. § 1605A 4, 5, 6, 11, 12, 13, 15, 17, 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 31, 32

28 U.S.C. § 1605A(a) 13, 23, 24

28 U.S.C. § 1605A(c) 4, 6, 11, 13, 23, 24, 29

28 U.S.C. § 1608(e) 2

28 U.S.C. § 1609 7

28 U.S.C. § 1610(a) 3, 5, 6, 8, 9, 10, 15, 16, 17, 19, 21, 23, 24, 25, 26, 27, 28, 30, 31

28 U.S.C. § 1610(b) 8, 9, 16, 19, 28

28 U.S.C. § 1610(c) 31

28 U.S.C. § 1610(f) 25

28 U.S.C. § 1610(g)(1) 1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

28 U.S.C. § 1611 7

50 U.S.C. app. § 4605(j) 1, 28

Antiterrorism and Effective Death Penalty Act of 1996 § 221, Pub. L. No. 104-132, 110 Stat. 1214, 1241–43 ..... 8, 9

Iran Threat Reduction and Syria Human Rights Act of 2012 § 502(c)(1)(A), Pub. L. No. 112-158, 126 Stat. 1258, 1260 25

National Defense Authorization Act for Fiscal Year 2008 § 1083, Pub. L. No. 110-181, 122 Stat. 3, 338–44 ..... 6, 11, 13, 29, 30

Terrorism Risk Insurance Act of 2002 § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337 25

Regulations

31 C.F.R. § 596.201 note 11

Determination of President of the United States, No. 2001-3, 65 Fed. Reg. 66,483 (Oct. 28, 2000) 25

Legislative Materials

151 Cong. Rec. S6746 (daily ed. June 16, 2005) (statement of Sen. Specter) 14

154 Cong. Rec. S55 (daily ed. Jan. 22, 2008) (statement of Mr. Lautenberg) 16

A bill to amend title 28, H.R. 865, 109th Cong. (1st Sess. 2005) 14

A bill to amend title 28, S. 1257, 109th Cong. (1st Sess. 2005) 14

H.R. Rep. No. 110-477 (2007) (Conf. Rep.) 15, 16

Justice for Victims of State Sponsored Terrorism Act, S. 1944, 110th Cong. (1st Sess. 2007). 15

Other Authorities

Archaeological Instit. of Am., *On the Attachment of Cultural Objects to Compensate Victims of Terrorism* (Feb. 9, 2009) 22

14A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3662.4 (4th ed. 2017) 21

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 30

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Jennifer K. Elsea, Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* (2008) 8, 10, 15, 16, 31

3 Louis B. Kimmelman & Steven L. Smith, *Business and Commercial Litigation in Federal Courts* § 21:67 (4th ed. 2016) 20

Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* (2012) 22

Stephen Dycus, et al.,
Counterterrorism Law (3d ed. 2016) 21

Tobias A. Dorsey,
Some Reflections on Not Reading the Statutes,
10 Green Bag 2d 283 (2007) 29

INTEREST OF *AMICI CURIAE*[1]

Amici are Michael and Linda Bennett, victims of one of many terrorist attacks sponsored by the Islamic Republic of Iran. Amici hold a judgment against Iran for the murder of their daughter, and they have filed proceedings to attach Iranian assets in the United States in satisfaction of their judgments. Accordingly, amici have a direct and substantial interest in the correct interpretation of the Foreign Sovereign Immunities Act ("FSIA") and 28 U.S.C. § 1610(g)(1) in particular.

Iran is a designated state sponsor of terrorism, 50 U.S.C. app. § 4605(j), that has systematically enabled and financed terrorist attacks for almost four decades. For example, in 1983, Hezbollah—sponsored by Iran—detonated a truck bomb at a Marine barracks in Beirut, Lebanon, killing 241 American servicemen and wounding dozens more. *See Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1319–20 & n.6 (2016). The 1996 bombing of the Khobar Towers in Saudi Arabia—another attack accomplished with Iran's material support—killed 19 United States servicemen among many others. *See Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11 (D.D.C. 2011).

Amici are the parents of Marla Ann Bennett, an American who died on July 31, 2002, when a Hamas

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici curiae or their counsel, made a monetary contribution to fund the preparation or submission of this brief. All parties have filed letters with the Clerk consenting to briefs of amici curiae.

operative detonated a bomb at the cafeteria of the Hebrew University of Jerusalem. In an action in federal court in the District of Columbia, amici proved by "evidence satisfactory to the court," 28 U.S.C. § 1608(e), that Iran materially supported Hamas, and was thus liable for the attack that killed their daughter. *See Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007). Amici are among the respondents in this Court in *Bank Melli* v. *Bennett*, No. 16-334. The *Bennett* case illustrates how Section 1610(g)(1) properly functions as a freestanding exception to a foreign state's sovereign immunity, as the Ninth Circuit concluded. *See Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 958–62 (9th Cir. 2016).

Bank Melli is Iran's largest bank, wholly owned by the government of Iran. *Bennett*, 825 F.3d at 957. Bank Melli is owed approximately $18 million in funds by Visa Inc. that are located in the United States and arise from a commercial relationship involving the use of Visa credit cards in Iran. *Ibid.* The *Bennett* Respondents filed a complaint in federal court seeking turnover of the Visa assets to satisfy their judgments against Iran. *Ibid.* The district court concluded that Section 1610(g)(1) allows the *Bennett* Respondents to attach Bank Melli's assets even if those assets are not used for commercial activity in the United States. *Bennett* v. *Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013). The Ninth Circuit affirmed, holding that Section 1610(g)(1) "was meant [by Congress] to allow attachment and execution with respect to *any property whatsoever* of the foreign state or its instrumentality." *Bennett*, 825 F.3d at 961 (emphasis added).

Whereas this case involves extraordinary facts and an attempt to attach museum antiquities, the facts in *Bennett*—which involves money in an account—are much more common among victims invoking Section 1610(g)(1) to execute on their judgments and attach the assets of foreign state sponsors of terrorism.

In this brief, amici argue that construing Section 1610(g)(1) as a freestanding exception to the sovereign immunity of assets of state sponsors of terrorism is most consistent with the statutory text, as well as Congress's manifest purpose to enlarge opportunities for victims of state-sponsored terrorism to access the funds of those terrorist states.

SUMMARY OF ARGUMENT

Section 1610(g)(1) is a freestanding exception to a foreign state's immunity against attachment and execution. Before 2008, Congress perceived multiple problems with the existing statutes authorizing victims of terrorism to obtain judgments against state sponsors of terrorism and then to attempt to satisfy those judgments: (1) Some courts did not recognize a cause of action directly against foreign states (only against their agents); (2) because of sanctions regimes, state sponsors of terrorism generally did not have assets in the United States that were used for a commercial activity, as required for attachment by 28 U.S.C. § 1610(a); and (3) some courts interpreted this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), to mean that victims of state-sponsored terrorism generally could not attach assets of an agency or

instrumentality of the terrorist state in satisfaction of a judgment against the state.

Congress addressed all of these problems when it amended the FSIA in 2008. First, Congress created a broad new cause of action directly against foreign states for their sponsorship of terrorism, in 28 U.S.C. § 1605A(c). At the same time, in order to enable victims to collect on their judgments, Congress paired that cause of action with a similarly broad new provision in Section 1610(g)(1) to govern attachment and execution of assets in satisfaction of judgments entered under Section 1605A. Section 1610(g)(1) empowers victims to attach "the property" of the terrorist state, or of its agencies and instrumentalities, without limitation to assets used for a commercial activity. And Congress further specifically abrogated, in this particular setting, the doctrine emanating from *Bancec* that had been held to limit when the assets of separate juridical entities can be seized in satisfaction of judgments against a foreign state. Section 1610(g)(1) thus makes all property belonging to a terrorist state's agencies and instrumentalities subject to attachment to satisfy a judgment against the state.

The statutory background of Section 1610(g)(1) confirms the text's broad meaning. The legislation was deliberately crafted in order to overcome the barriers that were preventing victims of terrorism from obtaining meaningful recovery. Multiple courts and commentators accordingly have read Section 1610(g)(1) as a freestanding abrogation of attachment-immunity that allows victims of terrorism with judgments under Section 1605A to access *any* property of the foreign state or its agency or instrumentality. In fact, this Court suggested that was the best

reading of the text in dicta in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016).

Section 1610(g)(1) allows attachment "as provided in this section," but Iran is wrong to argue that phrase means that victims of terrorism with judgments under Section 1605A must necessarily satisfy the requirements of another immunity exception set forth in Section 1610, in order to prevent Section 1610(a)(7) from being rendered superfluous. Section 1610(a)(7) is not superfluous, and never has been. Section 1610(g)(1) is available only for victims with judgments "entered under section 1605A." Yet there are many plaintiffs who have judgments against a state sponsor of terrorism under some other cause of action, and for them, Section 1610(a) remains the only viable means of attachment. The fact that Section 1610(g)(1) and Section 1610(a)(7) will *overlap* in certain cases is not surprising or odd in this statute: Congress has repeatedly expanded the rights of victims of terrorism by enacting attachment-immunity exceptions that partially overlap in certain cases. Congress deliberately used Section 1610(g)(1) to give victims a broad new attachment right, thereby ensuring that victims like petitioners and amici can actually collect against state sponsors of terrorism like Iran.

Iran is also wrong to contend that Section 1610(g)(1) does nothing more than abrogate *Bancec* in cases involving the seizure of assets in satisfaction of judgments under Section 1605A. *Bancec* applies only in cases involving the property of a juridical entity separate from the foreign state, so Iran's reading cannot be reconciled with the text of Section 1610(g)(1), which enables victims with judgments under Section 1605A to attach the property of the foreign state *itself*.

The statutory phrase "upon that judgment as provided in this section" refers to Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338–44, which created both 28 U.S.C. § 1610(g)(1) and the cause of action in Section 1605A(c) that enabled victims to obtain "that judgment." That reading is most consistent with the statutory purpose and would avoid the anomalies created by Iran's interpretation. In particular, whereas Iran argues that victims of terrorism with judgments under Section 1605A must overcome the commercial-use requirement in Section 1610(a), that requirement was precisely one of the provisions that frustrated victims of terrorism in their attempts to recover before 2008, and it was those frustrations that Congress sought to eliminate with Section 1610(g)(1). Because state sponsors of terrorism have few assets used for a commercial activity in the United States, Iran's reading of Section 1610(g)(1) would give victims almost no benefit at all. The text of Section 1610(g)(1) does not limit the right to attachment to property that is used for commercial activity, and victims with judgments entered under Section 1605A are entitled to rely on the more specific attachment-immunity exception that was created just for them.

ARGUMENT

28 U.S.C. § 1610(g)(1) Is A Freestanding Exception To Attachment Immunity

A. Congress adopted 28 U.S.C. § 1610(g)(1) in the course of expanding the rights of victims of terrorism

1. The jurisdiction of the United States over persons and property within its territory "is susceptible

of no limitation not imposed by itself." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Accordingly, the immunity of a foreign state in United States courts is "a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004).

Originally, foreign states enjoyed "virtually absolute immunity" from suit. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Before Congress enacted general legislation addressing foreign sovereign immunity, courts looked to the Executive Branch for guidance. *Id.* at 486–87. The Executive ultimately adopted a "restrictive" theory of foreign sovereign immunity, under which foreign states were immune from their public acts, but were not immune for purely "commercial acts." *Id.* at 487.

The FSIA, 28 U.S.C. § 1602 *et seq.*, enacted in 1976, created a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). The FSIA provides that foreign states are generally "immune" from state and federal jurisdiction, 28 U.S.C. § 1604, but it establishes various exceptions permitting particular types of suits, *id.* §§ 1604–1607, including where the claim is "based upon a commercial activity carried on in the United States," *id.* § 1605(a)(2).

The FSIA also addresses the immunity of a foreign state's assets. As originally enacted, the FSIA generally codified the restrictive theory of foreign sovereign immunity. Thus, the property of a foreign state is generally immune from execution, 28 U.S.C. § 1609, subject to exceptions, *id.* §§ 1610–1611. Among other

exceptions, the property of a foreign state in the United States is not immune when it is "used for a commercial activity in the United States" and certain other conditions are satisfied. *Id.* § 1610(a). Similarly, the property of an agency or instrumentality of a foreign state is available to satisfy a judgment against that agency or instrumentality when it is "engaged in commercial activity in the United States" and certain other conditions are satisfied. *Id.* § 1610(b).

2. Congress has continually amended and added to the FSIA's immunity-exceptions to expand plaintiffs' ability to sue foreign states and attach their property. In particular, Congress has repeatedly sought to expand opportunities for victims of state-sponsored terrorism to establish liability and collect damages. Iran has long sponsored and financed terrorist attacks, such as the suicide bombing perpetrated on petitioners here by Hamas. *See* Pet. App. 1–2. But until the mid-1990s, victims of such horrific attacks could not seek damages or enforce judgments against Iran; "foreign States were immune from civil liability in U.S. courts for injuries caused by acts of terrorism carried out by their agents and proxies," because such acts of terrorism were not viewed as "commercial activity." Jennifer K. Elsea, Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* 1 (2008); *see also Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361–62 (1993).

Beginning in 1996, Congress amended the FSIA several times in order to enable victims of terrorism to sue state sponsors of terror and to enforce their judgments. In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, Congress created a new exception to

the FSIA's immunity from jurisdiction to permit lawsuits by U.S. nationals alleging commission of or support for an act of terrorism against designated state sponsors of terrorism. *Id.* at § 221, 110 Stat. at 1241–43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)). At the same time, AEDPA matched that exception from jurisdictional immunity from suit with a new exception to the FSIA's immunity from attachment and execution. The new Section 1610(a)(7) permitted seizure of the foreign state's assets when they were "used for a commercial activity in the United States" and the party seizing the assets held a judgment that "relates to a claim for which the foreign state is not immune under section 1605(a)(7)." AEDPA § 221, 110 Stat. at 1243 (codified at 28 U.S.C. § 1610(a)(7) (2006)). Similarly, if "the judgment relates to a claim for which" the foreign state's "agency or instrumentality is not immune by virtue of ... section 1605(a)(7)," then execution is possible against the property of that agency or instrumentality if it "engage[s] in commercial activity in the United States." 28 U.S.C. § 1610(b)(3).

But AEDPA did not immediately succeed in allowing victims of state-sponsored terrorism to obtain redress. Some courts held that 28 U.S.C. § 1605(a)(7) and its amendments did not create a cause of action against foreign states (only against their agents), requiring plaintiffs to rely on widely varying state-law wrongful death and personal injury causes of action against foreign states. *See, e.g.*, *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1027 (D.C. Cir. 2004). Moreover, when victims did obtain judgments, they often could not collect because state sponsors of terrorism—which were usually subject to an array of

sanctions—conducted few commercial activities in the United States that would potentially make property available for attachment under Section 1610(a)(7) or (b)(3). *See* Elsea, *supra*, at 7–9; *Flatow* v. *Islamic Republic of Iran*, 76 F. Supp. 2d 16, 24 (D.D.C. 1999) (bank accounts were not related to commercial activity and thus not subject to attachment under Section 1610(a)(7)).

In addition, based on this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 620–21 (1983), courts generally rejected efforts by plaintiffs to satisfy their judgments against state sponsors of terrorism by seizing assets of agencies or instrumentalities of those states. *See, e.g.*, *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1287 (11th Cir. 1999); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002). *Bancec* had established a general presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626–27. After *Bancec*, some courts pronounced five "*Bancec* factors" to determine whether the presumption of separateness has been overcome. *See Walter Fuller Aircraft Sales* v. *Republic of Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Although the text of Section 1610(a)(7) seems to allow seizure of an instrumentality's assets that are used for a commercial activity in the United States—it allows qualifying judgments against "the foreign state" to be enforced against property in the United States of the "foreign state, as defined in [28 U.S.C. § 1603(a)]," including "an agency or instrumentality of a foreign state," *id.* § 1603(a)—cases like *Alejandre*

and *Flatow* invoked the "*Bancec* factors" and held that the presumption of separateness had not been overcome, so the property of agencies or instrumentalities could not be seized.

In 2008, Congress addressed all of these problems—the absence of a clear federal cause of action against terrorist states; the limitation of seizures to the virtually non-existent category of assets "used for a commercial activity in the United States"; and the inability to recover from the agencies and instrumentalities of terrorist states—by amending the FSIA as part of the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA") § 1083, Pub. L. No. 110-181, 122 Stat. 3, 338–44. Congress abrogated *Cicippio-Puleo* by creating a new, more expansive federal-law cause of action directly against foreign-state sponsors of terrorism for their support of terrorist attacks. 28 U.S.C. § 1605A(c); *see also Owens* v. *Republic of Sudan*, 864 F.3d 751, 765 (D.C. Cir. 2017). And in the same Section of the 2008 NDAA, Congress created Section 1610(g)(1), a new provision to govern attachment and execution against the assets of a foreign state and its agencies and instrumentalities in terrorism cases.[2]

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[2] Today, the remaining designated state sponsors of terrorism are Iran, Sudan, and Syria. *See* 31 C.F.R. § 596.201 note. So Section 1605A and the attendant attachment-immunity exception in Section 1610(g)(1) can be applied against the assets only of those states.

B. Section 1610(g)(1)'s text and structure allow victims to attach any property of a foreign state sponsor of terrorism or its instrumentalities

The text of 28 U.S.C. § 1610(g)(1)—in contrast to earlier statutes that provided for seizure of foreign states' assets—uses exceedingly broad and encompassing language to describe terrorism victims' entitlement to attachment and execution. When a victim has obtained a "judgment ... under section 1605A" against a foreign state sponsor of terrorism for its role in carrying out or facilitating terrorism, "*the property* of [the] foreign state, ... and *the property* of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, *is subject to attachment* in aid of execution, and execution, upon that judgment as provided in this section." *Ibid.* (emphases added). The assets are subject to attachment "regardless of" the *Bancec* factors. *Ibid.*

Thus, by the plain text of the statute, Section 1610(g)(1) does multiple things at once for victims of terrorism with judgments under Section 1605A: First, in cases where a victim locates property of the terrorist state itself, Section 1610(g)(1) abrogates execution and attachment immunity and enables the victim to attach "the property." Second, in cases where the victim locates the property of the terrorist state's agency or instrumentality, Section 1610(g)(1) additionally makes that property available to satisfy the Section 1605A judgment. And for those latter cases, the statute also specifically abrogates the *Bancec* factors, making pellucid Congress's intention that the assets of any agency or instrumentality of a terrorist state be

available for seizure "regardless of" its status as a separate juridical entity.

This comprehensive right to attachment is consistent with the structure of the FSIA as a whole after Congress amended it in the 2008 NDAA. The attachment provision in Section 1610(g)(1) corresponds to the new cause of action in Section 1605A that Congress created in the same section of the same legislation. When Congress gave to certain victims of state-sponsored terrorism a new federal cause of action against terrorist states, 28 U.S.C. § 1605A(c), it also provided to persons with judgments under that new cause of action the right to seize, in satisfaction of those judgments, the assets of both the terrorist state and its agencies and instrumentalities. That is why the 2008 NDAA labeled Section 1610(g)(1) as a "conforming amendment[ ]" to the provision that created Section 1605A. 2008 NDAA § 1083(b)(3), 122 Stat. at 341. The breadth of Sections 1605A and 1610(g)(1) accord with each other, and the provisions work together to overcome the barriers that existed under the prior version of the FSIA and thereby enable meaningful recovery for victims.

Congress well understood that it was according terrorism victims an extremely powerful new tool to obtain redress, but at the same time tethering that tool to the new federal cause of action under Section 1605A. For that reason, Congress included in the 2008 NDAA a provision allowing plaintiffs who had previously proceeded under Section 1605(a)(7)'s immunity exception to convert their judgments or refile their claims under Section 1605A. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(II).

C. Section 1610(g)(1)'s background and purpose confirm the meaning of the broad text

It is undisputed that, in the 2008 NDAA, Congress "meant to expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism." *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 961 (9th Cir. 2016).

The legislation that eventually became Section 1610(g)(1) first was debated in 2005. *See* A bill to amend title 28, S. 1257, 109th Cong. (1st Sess. 2005); To amend title 28, H.R. 865, 109th Cong. (1st Sess. 2005). Senator Specter, in his remarks introducing the bill, stated that it would "clarif[y] a private right of action, in Federal courts, for U.S. citizens against state sponsors of terrorism and will ultimately make it easier for victims of such acts to collect court-ordered damages against state-sponsors of terrorism." 151 Cong. Rec. S6746 (daily ed. June 16, 2005) (statement of Sen. Specter). Regarding attachment, Senator Specter stated that the bill would "eliminat[e] many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism," referencing *Bancec* in particular. *Ibid.* Senator Specter stated that the bill would "ease the burden on the families of victims of terrorism by permitting them to attach the hidden assets of terrorist states held within the United States." *Ibid.* Senator Specter's bill died in committee.

In 2007, Senator Lautenberg introduced a new bill that was ultimately enacted as part of the 2008

NDAA. Justice for Victims of State Sponsored Terrorism Act, S. 1944, 110th Cong. (1st Sess. 2007). The Report of the Conference Committee described the legislation as "expand[ing] the ability of claimants to seek recourse against the property of [terrorism-sponsoring] foreign state[s]" by "permitting any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.). The Conference Report then reiterated that "the provision is written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Id.* at 1001–02 (emphasis added).

After the 2008 NDAA was enacted, a report on it by the Congressional Research Service likewise stated that "the purpose of th[is] provision is to enable any property in which the foreign state has a beneficial ownership to be subject to execution for terrorism judgments, except for diplomatic and consular property," and that "[t]he language renders subject to execution any property" that belongs to "the defendant foreign State." Elsea, *supra*, at 55.

Section 1610(g)(1)'s legislative history thus confirms what its text shows. The provision accomplishes two goals: (1) it expands the universe of foreign-state assets and foreign-instrumentality assets that are available for attachment and execution upon Section 1605A judgments in order to sweep in not just assets "used for a commercial activity in the United States," 28 U.S.C. § 1610(a), but "any property interest" of a terrorist state; and (2) for assets held in the name of separate juridical entities, Section 1610(g)(1) specifically abrogates *Bancec* as a barrier to attachment.

The statute "permit[s] any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment," H.R. Rep. No. 110-477, at 1001, and "renders subject to execution any property" of "the defendant foreign State," Elsea, *supra*, at 45–46, "upon the satisfaction of a 'simple ownership' test," 154 Cong. Rec. S55 (daily ed. Jan. 22, 2008) (statement of Mr. Lautenberg), without regard to whether the property is used for a commercial activity.

D. Courts and commentators have understood Section 1610(g)(1) to be a freestanding exception to attachment immunity

1. The vast majority of courts to interpret Section 1610(g)(1) have read it as just such a freestanding abrogation of attachment immunity. In fact, this Court read Section 1610(g)(1) that way (albeit in dicta) in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016). There, the Court explained that "[v]ictims of state-sponsored terrorism ... have often faced practical and legal difficulties" enforcing their judgments. *Id.* at 1317–18. At first, "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318 (quoting 28 U.S.C. § 1610(a)(7), (b)(3)). But then in 2008, Congress enacted Section 1610(g)(1), which "expand[ed] the availability of assets for postjudgment execution" by "mak[ing] available for execution the property ... of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state." *Id.* at 1318 n.2. This Court's opinion in *Bank Markazi* shows that the simplest reading of Section 1610(g)(1) is also the best: The provision abrogates immunity against execution

for judgment-holder victims; it does not force those victims back into the difficult task of satisfying the commercial-use requirement of Section 1610(a).

Moreover, until the Seventh Circuit's opinion in this case, every court of appeals to consider the issue had held or suggested that Section 1610(g)(1) created a freestanding exception to attachment immunity. The Second Circuit, for instance, stated that Section 1610(g)(1) "allow[s] attachment of property of a foreign state against which a judgment is entered under section 1605A." *Calderon-Cardona* v. *Bank of New York Mellon*, 770 F.3d 993, 999 (2d Cir. 2014). The Second Circuit also made clear that "Section 1610(g) not only allows attachment of property of a foreign state but also property of an agency or instrumentality that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." *Ibid.* The Second Circuit thus helpfully distinguished Section 1610(g)(1)'s two effects: (1) abrogating attachment immunity for all foreign-state and foreign-instrumentality property in Section 1605A cases; and (2) abrogating the *Bancec* presumption and use of the *Bancec* factors in cases involving separate juridical entities. *See also Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2d Cir. 2016) ("Section 1610(g) strips FSIA attachment immunity from the property of a 'foreign state' or of its 'agency or instrumentality' if the underlying judgment was entered under § 1605A's terrorism exception.").

The D.C. Circuit also has stated that, "[o]nce a Section 1605A judgment is obtained, Section 1610(g) strips execution immunity from *all* property of a defendant sovereign." *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Section

1610(g)(1) "subjects to attachment the property of a foreign state and the property of an agency or instrumentality of such a state against which a plaintiff holds a judgment under 28 U.S.C. § 1605A." *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937 (D.C. Cir. 2013). Thus, Section 1610(g)(1)'s "requirements" are "satisfied" if the assets at issue are "property" of "a foreign state" against whom "plaintiffs hold a judgment under ... 28 U.S.C. § 1605A." *Id.* at 937–38 (internal quotation marks omitted).

And in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), where amici are plaintiffs, the Ninth Circuit dealt extensively with this question. The court held that "subsection (g) contains a free-standing provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." *Id.* at 959. That provision "covers a different subject than § 1610(a) through (e): by its express terms, it applies only to 'certain actions,' specifically, judgments 'entered under Section 1605A.'" *Ibid.* "By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like)." *Ibid.* Therefore, "Section 1610(g) requires only that a judgment under § 1605A have been rendered against the foreign state; in that event, both the property of the foreign state and the property of an agency or instrumentality of that state are subject to attachment and execution." *Ibid.* *Bennett* was also consistent with a prior opinion from the Ninth Circuit, which had interpreted Section 1610(g)(1) as "expand[ing] the category of foreign sovereign property that can be attached; judgment creditors can now

reach any U.S. property in which Iran has any interest." *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010).

Before *Rubin*, the Seventh Circuit had twice interpreted Section 1610(g)(1) as a freestanding abrogation of attachment immunity, holding that the provision "authorizes attachment of property of foreign state sponsors of terrorism and their agencies or instrumentalities to execute judgments under § 1605A for state-sponsored terrorism" even when plaintiffs "are not seeking attachment under § 1610(a) or (b)." *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 575 (7th Cir. 2014). The Seventh Circuit in *Gates* stated that when Congress "replaced the then-existing terrorism exception to immunity ... with a broader terrorism exception" in Section 1605A, Congress matched that broad cause of action with Section 1610(g)(1), a "powerful attachment provision available only to victims of state-sponsored terrorism who hold judgments under § 1605A." *Ibid.* And in *Wyatt* v. *Syrian Arab Republic*, the Seventh Circuit held that Section 1610(g)(1) is not subject to Section 1610's other requirements, which is "consistent with" Congress's purpose "to make it easier for terrorism victims to obtain judgments and to attach assets." 800 F.3d 331, 343 (7th Cir. 2015). *See also* Pet. App. 41 (Hamilton, J., dissenting from denial of rehearing en banc) ("[I]n interpreting an ambiguous statutory text [like Section 1610(g)(1)], we can and should draw on statutory purpose and legislative history.").

Many district courts have come to the same conclusion. *See, e.g.*, *Martinez* v. *Republic of Cuba*, 149 F. Supp. 3d 469, 473 (S.D.N.Y. 2016) ("FSIA Section

1610(g) abrogates sovereign immunity against execution for judgments under Section 1605A."); *Kapar* v. *Islamic Republic of Iran*, 105 F. Supp. 3d 99, 107 (D.D.C. 2015) ("for awards under Section 1605A, the property of a foreign state, agency, or instrumentality available for attachment is not limited by any reference to 'commercial activity.' ... Congress therefore made it much easier for Section 1605A plaintiffs to collect on their judgments"); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 984 F. Supp. 2d 1070, 1094–95 (S.D. Cal. 2013) ("The plain language of the statute supports a broad reading. Section 1610(g) allows attachment of any 'property of a foreign state against which a judgment is entered under Section 1605A.' Congress did not qualify the definition by limiting it to property connected to a commercial activity."); *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 19 n.8 (D.D.C. 2011) ("[Section] 1610(g) does not limit attachment to property used in 'commercial activity'—unlike the execution provisions found in § 1610(a) & (b)."); *but see Owens* v. *Republic of Sudan*, 141 F. Supp. 3d 1, 6 (D.D.C. 2015) ("[Section] 1610(g) is not [a] freestanding immunity exception.").

2. Numerous legal treatises and commentators have also understood Section 1610(g)(1) as *both* broadening the scope of foreign-state and foreign-instrumentality assets that can be attached to satisfy Section 1605A judgments, *and* abrogating the *Bancec* presumption for separate juridical entities. One treatise states that Section 1610(g)(1) "limit[s] the application of foreign sovereign immunity" as a "defense[ ] to post-judgment attachment or execution with respect to

property belonging to designated state sponsors of terrorism." 3 Louis B. Kimmelman & Steven L. Smith, *Business and Commercial Litigation in Federal Courts* § 21:67 (4th ed. 2016).

Similarly, a prominent textbook states that Section 1610(g)(1) "exposes to attachment most property in which a foreign state has an interest, when that state has a judgment entered against it under §1605A." Stephen Dycus, et al., *Counterterrorism Law* 949 (3d ed. 2016). While Section 1610(a) is limited to assets "used for a commercial activity," Section 1610(g)(1) "broadened the universe of exposed assets further [beyond Section 1610(a)] to include most property in which the foreign state has any interest." *Id.* at 951.

Wright & Miller's leading treatise acknowledges that, in addition to abrogating the *Bancec* presumption, "Section 1610(g) also may provide a basis for attaching property, regardless of commercial use, in aid of execution of a judgment entered under the terrorism exception." 14A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3662.4 (4th ed. 2017).

3. The attachment provision in Section 1610(g)(1) is intentionally broad to reach a wide variety of foreign-state assets. At the time of the 2008 NDAA, museums and archaeological societies understood that Section 1610(g)(1) would subject to attachment and execution art pieces loaned from a state sponsor of terrorism to a United States museum, even if the pieces were not used for a commercial activity. Just after the 2008 NDAA was passed, Syria –another state sponsor of terrorism—cancelled its planned loan of 55 artifacts

to the Metropolitan Museum of Art ("Met"), lest victims of Syrian terrorism attach the museum pieces. *See* Holland Cotter, *Art Review, Beyond Babylon: Global Exchange, Early Version*, N.Y. Times (Nov. 20, 2008) (describing the Met's statement that "recent legislation ... has made it too difficult and risky for the planned loans to proceed"). The Archaeological Institute of America ("AIA") issued a public statement describing the "concern," "in light of the 2008 amendments," that "the objects" would not be protected "from attachment by individuals who have claims against Syria for supporting terrorist activity." AIA, *On the Attachment of Cultural Objects to Compensate Victims of Terrorism* (Feb. 9, 2009)[3]; *see also* Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* 117 (2012) (describing the incident).

Taking all of these sources together, an overwhelming weight of authority has supported treating Section 1610(g)(1) as a freestanding exception to the attachment immunity of a terrorist state.

E. Iran's narrow reading of Section 1610(g)(1) cannot be reconciled with the statute's text and purpose

1. Iran's argument rests entirely on the clause in Section 1610(g)(1) stating that foreign-state property is subject to attachment "as provided in this section." Iran argues that those five words drastically change the meaning of the statute from a provision that made available for seizure all property interests of state-sponsors of terrorism into a mere abrogation of

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[3] https://goo.gl/EgXauQ

Bancec's presumption of separateness, so that a terrorism victim must still rely on some other provision of section 1610 to overcome the immunity against attachment of foreign-state property. Iran further contends that this interpretation of "as provided in this section" is necessary in order to avoid reading Section 1610(g)(1) in a way that would render Section 1610(a)(7) superfluous. Br. in Opp. of Iran at 12; *see also* Br. for the United States as Amicus Curiae Supporting Certiorari at 12. Iran is wrong. Although the two statutes will overlap in certain cases, Section 1610(g)(1) is at once both broader and narrower than Section 1610(a)(7).

i. First, Section 1610(g)(1) is broader because, whereas Section 1610(a)(7) removes immunity only for a foreign state's property that is "used for a commercial activity in the United States," Section 1610(g)(1) removes immunity from "the property of a foreign state" and "the property of an agency or instrumentality" of that state. Section 1610(g)(1)'s text has no "commercial use" limitation.

At the same time, however, Section 1610(g)(1) is also narrower than Section 1610(a)(7). While Section 1610(g)(1) requires "a judgment ... entered under section 1605A," Section 1610(a)(7) applies to any judgment that "relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)." That latter category includes terrorism claims against terrorist states as to which Section 1605A(a)(1) vitiates immunity, but which proceed under state-law causes of action rather than the federal cause of action created by Section 1605A(c). *See Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841

(D.C. Cir. 2009) ("[I]f an FSIA exception abrogates immunity, plaintiffs may bring state law claims that they could have brought if the defendant were a private individual."). There are numerous victims of state-sponsored terrorism for whom Section 1605A does not provide a cause of action, because the plaintiffs are not nationals of the United States, members of the armed forces, or employees or contractors of the United States government, as required by 28 U.S.C. § 1605A(c)(2)(A)(ii). *See, e.g.*, *Peterson* v. *Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44–45 (D.D.C. 2007) (plaintiffs obtained judgments against Iran under state law), *overruled on other grounds by Lin* v. *United States*, 561 F.3d 502, 208 (D.C. Cir. 2009). For these victims and others proceeding under state law, Section 1610(a)(7) remains the primary operative attachment provision.

The United States has argued that Section 1610(a)(7) was "irrelevant" at least at the time the 2008 NDAA was passed because in that bill, Congress amended Section 1610(a)(7) by striking out the reference to Section 1605(a)(7) and replacing it with a reference to Section 1605A, so that at the time, Section 1610(a)(7) "referred *solely* to judgment creditors under Section 1605A." Br. for the United States as Amicus Curiae Supporting Certiorari at 12. But the United States has conflated the abrogation of immunity in Section 1605A, which is what matters for purposes of Section 1610(a)(7), with the cause of action in Section 1605A, which is what matters for Section 1610(g)(1). Even at the time of the 2008 NDAA, Section 1610(a)(7) remained quite relevant to any terrorism plaintiff who was using the immunity-waiver in Section 1605A(a)

but who was proceeding under a state-law cause of action. For those plaintiffs, their judgments would "relate[ ] to a claim for which the foreign state is not immune under section 1605A," 28 U.S.C. § 1610(a)(7) (2008), but the judgments would not be "entered under section 1605A," and thus the judgments could be enforced under Section 1610(a)(7) but not Section 1610(g)(1). Reading Section 1610(g)(1) as a freestanding abrogation of immunity for Section 1605A judgment-holders has never rendered other provisions of the FSIA superfluous.[4]

ii. To be sure, Section 1610(g)(1) and Section 1610(a)(7) will sometimes overlap: There are some victims of terrorism, and some categories of foreign-state assets, where execution would be possible under either Section 1610(g)(1) or the commercial-use exception. Indeed, *Bennett* is just such a case. *See Bennett*, 825 F.3d at 967 (Benson, J., concurring in part and dissenting in part). But in this statute, that overlap is not surprising or noteworthy. Section 1610(g)(1) was not the first time that Congress created overlapping categories of attachment immunity. There can be no doubt that 28 U.S.C. § 1610(f)(1) is a freestanding exception to attachment immunity for foreign-state assets subject to sanction, yet it was entirely possible that those same assets would be used by the foreign

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[4] Congress later realized that not every litigant proceeding under the old Section 1605(a)(7) would convert their case to one under the new Section 1605A, so in 2012 it added back in to Section 1610(a)(7) a reference to cases where the plaintiff used the immunity-exception in Section 1605(a)(7). *See* Iran Threat Reduction and Syria Human Rights Act of 2012 § 502(e)(1)(A), Pub. L. No. 112-158, 126 Stat. 1258, 1260.

state "for a commercial activity," and so would be attachable for that reason as well. After Section 1610(f)(1) was enacted, President Clinton exercised the authority granted to him to waive that provision. *See* 28 U.S.C. § 1610(f)(3); Determination of President of the United States, No. 2001-3, 65 Fed. Reg. 66,483 (Oct. 28, 2000). But that was a discretionary determination that can be revisited by the president at any time, thereby restoring the statutory overlap.[5]

When Congress wrote the 2008 NDAA, it was unsatisfied with the existing options for attachment and execution that were available to terrorism victims. Rather than use a scalpel to precisely tailor the existing Section 1610(a)(7) in just-the-right way, Congress painted over the existing regime with a broad new attachment-immunity provision in Section 1610(g)(1) that spared many terrorism victims—but not all, just those with judgments "entered under section 1605A"—the effort, time, and expense of demonstrating that the terrorist state's interest in property was used for a commercial activity or owned by the sovereign itself and not through an instrumentality.

Though certainly "there are times" when Congress enacts a provision that renders an earlier enacted provision "superfluous," *Microsoft Corp.* v. *I4I Ltd. P'ship*, 564 U.S. 91, 107 (2011), at least for victims of state-sponsored terrorism with judgments under state-law

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[5] Similarly, the Terrorism Risk Insurance Act of 2002 ("TRIA") § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337, overlaps with Section 1610(g)(1) and Section 1610(f) by independently making blocked assets like those at issue in *Bennett* subject to attachment. *See Bennett*, 825 F.3d at 957–58 (majority op.).

causes of action, the 2008 NDAA did not convert Section 1610(a)(7) into mere "verbosity and prolixity." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 236 (2011). Rather, Section 1610(a)(7) was a vital means—indeed, the only realistic means—of obtaining redress for some victims. There is simply no adverse inference to be drawn from the fact that Congress has created a system that allows certain categories of assets to be attached pursuant to multiple different sources. That has been an intentional part of Congress's design of the FSIA's terrorism exceptions for more than a decade.

2. "[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft*, 564 U.S. at 106 (quotation marks omitted). And here, Iran's interpretation of Section 1610(g)(1) "has a superfluity problem of its own." *Bruesewitz*, 562 U.S. at 236 n.48.

Iran's argument, adopted by the Seventh Circuit below, is that Section 1610(g)(1) does only one thing: "[I]t partially abrogates the so-called *Bancec* doctrine, which holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality." Pet. App. 4; *see also* Br. in Opp. of Iran 17 (Section 1610(g)(1) "merely eliminates the five *Bancec* factors as a barrier to recovery."). But that *cannot* be all the statute does, because *Bancec* is relevant only to cases involving an entity that is juridically separate from the foreign state itself. *See* 462 U.S. at 626–27 ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); *Hester Int'l Corp.* v. *Fed. Republic of Nigeria*, 879 F.2d 170, 179 (5th Cir. 1989)

(*Bancec* guides the "determination of whether a government instrumentality is a separate juridical entity"). Section 1610(g)(1), on the other hand, reaches further: It subjects to attachment "the property *of a foreign state*." (Emphasis added.) If Iran were right that Congress's sole objective for Section 1610(g)(1) was to abrogate *Bancec*, then Congress would not have needed to authorize separately the seizure of "the property of a foreign state." On Iran's reading, that portion of the text is simply duplicative of the right to seize assets of a foreign state that is already provided by Section 1610(a).

In other words, on Iran's view of the statute, Section 1610(g)(1) could have achieved the same meaning if Congress had said, "when a judgment is entered against a foreign state under section 1605A, the property of an agency or instrumentality of such a state is subject to attachment." But in fact, Congress authorized attachment of "the property of a foreign state ... *and* the property of an agency or instrumentality of such a state." 28 U.S.C. § 1610(g)(1) (emphasis added).

Iran has attempted to evade this problem by arguing that Section 1610(g)(1)'s abrogation of *Bancec* applies in seizure proceedings under both Section 1610(a)(7) and Section 1610(b)(3). But that cannot be right, either. Under Section 1610(b)(3), the plaintiff is seizing the assets of an agency or instrumentality to satisfy his judgment against *that* agency or instrumentality; the statute requires a judgment on "a claim for which the *agency or instrumentality* is not immune." 28 U.S.C. § 1610(b)(3) (emphasis added). In that scenario, *Bancec* and its factors for assessing separate juridical status from the sovereign have no relevance. So if Iran were right and Congress meant to do

nothing more than abrogate *Bancec*, leaving victims limited to assets used for a commercial activity, then Section 1610(g)(1) ought to have said "as provided in *sub*section (a)(7)."

3. The best understanding of the phrase "upon that judgment as provided in *this section*" is that it refers to Section 1083 of the 2008 NDAA, which created both Section 1610(g)(1) and Section 1605A. *See* 122 Stat. at 341. It is the 2008 NDAA that is authoritative law. *See Stephan* v. *United States*, 319 U.S. 423, 426 (1943) (the Statutes at Large, not the United States Code, are controlling law); *see generally* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283, 284 (2007). "[A]s provided in this section" modifies "that judgment," meaning "a judgment ... entered under section 1605A," 28 U.S.C. § 1610(g)(1), and it was Section 1083 of the 2008 NDAA that created the federal cause of action in Section 1605A(c) for victims of terrorism to obtain a judgment against terrorist states. Section 1083 also created the new remedial provision applicable to such judgments, allowing the holder to seize any interest in property of the terrorist state.

Congress used the phrase "this section" several times in Section 1083 of the 2008 NDAA, and some of those other uses unambiguously refer to Section 1083. *See, e.g.*, § 1083(c), 122 Stat. at 342 ("The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code."); § 1083(e), 122 Stat. at 344 ("If any provision of this section ... is held invalid, the remainder of this Section ... shall not be affected[.]"). Unfortunately, in Section 1610(g)(1), Congress unintentionally created an ambiguity by using the phrase "this section" while at the

same time directing that the new provision be codified in a particular part of the United States Code, namely 28 U.S.C. § 1610(g)(1). But that ambiguity should be resolved by Congress's purpose for this statute. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538–39 (1947) (the "policy" of a statute "is evinced in the language of the statute, as read in light of the other external manifestations of purpose"). It is clear from the statutory background, the Conference Report, and the understanding of multiple courts and commentators since enactment that Congress's purpose was to make it significantly easier for victims of terrorism to effectively execute on their judgments. Reading "as provided in this section" in Section 1610(g)(1) to refer to Section 1083 would both support the statutory purpose and avoid the textual anomalies created by Iran's interpretation.

Iran's reading, by contrast, would force victims to overcome the onerous commercial-use requirement in Section 1610(a)(7), which, given the dearth of assets of terrorist states that are "used for a commercial activity in the United States," is tantamount to leaving victims with no additional means of redress at all. That is clearly not what Congress intended. Congress knew that, before the 2008 NDAA, the commercial-use requirement in Section 1610(a) was among the barriers frustrating terrorism victims in their attempts to collect on their judgments. *See Rubin* v. *Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006); *Flatow*, 76 F. Supp. 2d at 24; Elsea, *supra*, at 7–9. And yet according to Iran, Section 1610(g)(1) did nothing to benefit these victims because it made no change to the commercial-use requirement. Iran's reading

would significantly undermine the benefit to terror victims —particularly victims of *Iranian* terrorism— that was one explicit purpose of the 2008 NDAA.

Congress did not insert any language about commercial activity into the attachment-immunity exception in Section 1610(g)(1), and this Court has no call to insert that missing language. *See Dean* v. *United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." (citation omitted)). Nor did Congress's new attachment-immunity exception refer back to Section 1610(a), even though Congress knows how to do that: Section 1610(c) provides special service requirements that explicitly apply only to "subsections (a) and (b) of this Section." If Congress had meant to limit Section 1610(g)(1)'s attachment right to the terms of Section 1610(a), it would have done so.

Section 1610(a) is the FSIA's *generic* provision for executing on a judgment—of whatever kind—against a foreign sovereign, whereas Section 1610(g)(1) was created specifically to address victims of terrorism with judgments under Section 1605A. Victims seeking to execute on their judgments are entitled to rely on the more specific provision that addresses their particular situation in Section 1610(g)(1), without being forced back into the more general attachment provision in Section 1610(a). *See Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general. ... A general [provision] cannot be allowed to supersede the specific [provision.]").

CONCLUSION

Congress's path of legislation has continually attempted to make it easier for judgment-creditors to collect against terrorist states. Section 1610(g)(1) is among the most expansive of these efforts. The provision is a freestanding abrogation of immunity that means just what it says: *The property* of a foreign state, or of its agencies and instrumentalities, is available to satisfy a Section 1605A judgment against that state for its sponsorship of terrorism.

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted.

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